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The Remix Artist's Catch-22: A Proposal for Compulsory Licensing for Transformative, Sampling-Based Music

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I. Introduction

> And then in came Raekwon, and up went the confetti, and the security guys moved aside, as instructed, and the kids streamed onto the stage from both sides, and within sixty seconds there were a hundred of them up there, maybe more, every square inch jammed . . . . By the time the show reached its climax, around 1 a.m., [he] was standing on top of his table, high above the crowd, his long hair plastered to his sweat-soaked face, his arms in the air, one foot planted on either side of his laptop, which was issuing forth Lil Wayne's rap from "A Milli" over the anthemic coda to Journey's stadium-size power ballad "Faithfully." He was a remix rock star . . . .[1]

This is a description of a live concert of one of America's top remix music artists.[2] The music it describes is novel and artistically fascinating, but it is also arguably illegal. The thousands of fans at shows like this are not interested in copyright law; nor are the musicians who create this music. But it affects both of them, imposing a strong presumption of illegality and, in some cases, preventing gripping new musical works from being created at all.

The chilling effect of intellectual property law on musical creativity and the communicative ability of music is well documented.[3] Nowhere is this more the case than with "sampling"—the process of using an existing sound recording within a new one.[4] Over time, the use of sampling has become more and more creative, moving from the simple appropriation of a

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1. Paul Tough, *Girl Talk Get Naked. Often*, GQ (Oct. 2009), http://www.gq.com/entertainment/music/200909/gregg-gillis-girl-talk-legal-mash-up?currentPage=2 (last visited Mar. 22, 2011) (on file with the Washington and Lee Law Review).

2. While this live performance and a similar recording could contain the exact same music, the two are legally very different. This Note deals only with recorded music. Because recording copyrights do not grant their owners an exclusive right to public performance, live concerts are less of an issue.

3. *See, e.g.*, KEMBREW MCLEOD, OWNING CULTURE 139–45 (2001) (discussing the effect of copyright on visual and sound collage); SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 185–89 (2001) (arguing that instead of its intended purpose "more and more, excessive and almost perpetual copyright protection seems to be squelching beauty, impeding exposure, stifling creativity").

4. *See infra* notes 49–53 and accompanying text (defining sampling and describing its emergence in music).

single beat to the layered use of several samples in collage-like recordings.[5] But the musicians behind these new recordings cannot release their work and profit from it because of the restrictions of copyright law.[6] This prohibition might make some sense if the copyright regime entirely failed to recognize the tradition of appropriation and allusion in music.[7] But copyright does acknowledge these time-honored practices by allowing musicians to "cover" the songs of other musicians.[8]

Contemporary law's treatment of sampling as automatic copyright infringement is not in line with the traditions of musical copyright and is keeping legitimate artists from earning a living through their music.[9] Consider the example of sampling the Beatles: "[W]hile the Beatles' tunes have been recorded by thousands of bands, their song catalog [of recordings] has been notoriously off-limits to hip-hop and dance-music producers' manipulations."[10] The treatment of the Beatles catalogue demonstrates the arbitrary legal distinction between covering, which is always allowed, and sampling, which always requires permission.[11] One DJ learned about this distinction the hard way when he made an entire album of Beatles remix and was sued by the Beatles' record label, EMI.[12] One authorized, high-profile remix of Beatles recordings does exist: The 2006 album *Love*.[13] This record, however, required extensive permissions and likely could not have been made by anyone other than its creator, the

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5. *See infra* notes 63–75 and accompanying text (describing new types of sampling-based music).

6. *See infra* Part IV (demonstrating the legal catch-22s of remix artists).

7. *Cf. infra* notes 120–21 and accompanying text (discussing the importance of "transformative appropriation" in the history of music and how musicians have always built on what has come before them).

8. *See infra* notes 110–13 and accompanying text (discussing the copyright system's allowance of covers).

9. *See infra* notes 235–49 and accompanying text (explaining why artists who try to make money from their sampling-based music are more likely to be committing copyright infringement).

10. Noah Shachtman, *Copyright Enters a Gray Area*, WIRED (Feb. 14, 2004), http://www.wired.com/entertainment/music/news/2004/02/62276 (last visited Mar. 22, 2011) (on file with the Washington and Lee Law Review).

11. *Id.*

12. *See id.* (discussing DJ Danger Mouse's *The Grey Album*, a remix combination of The Beatles' *White Album* and Jay-Z's *Black Album*); *see also* Noah Balch, Note, *The Grey Note*, 24 REV. LITIG. 581, 592–607 (2005) (considering defenses to the infringement claims against DJ Danger Mouse).

13. *See* Edna Gundersen, *"Love," Love ReDo; Beatles Wizard Martin and Son Concoct an "Organic" Musical Stew*, USA TODAY, Nov. 14, 2006, at D1 (describing the creation of this remix as a new view on the Beatles' music).

Beatles' original producer, George Martin.[14] In fact, even Martin could not believe that his remix was approved, "considering [the] fastidious guardianship of the Beatles catalog."[15] Remix reinterpretations of the Fab Four's recordings are off limits for all but Beatles insiders, yet any cover musician can use the Beatles compositions. There is no explanation for this distinction other than woefully outdated copyright laws.

"Catch-22" is Joseph Heller's well-known name for a situation in which one can make a decision, but either choice will have negative consequences.[16] One is thus knowingly victimized by a system but cannot escape from it. This Note will expose several catch-22 situations that have arisen in modern copyright law by exploring one of the most high-profile examples of outmoded copyright law—remix musical culture. The goal of this Note is to demonstrate the various lose-lose situations in which remix musicians find themselves as a result of an archaic copyright regime and to propose a way to remove them from the legal maze in which their creativity currently exists. It will attempt to establish a compulsory licensing scheme for musical recordings and will address why other solutions are unsatisfactory. Compulsory licensing, this Note concludes, provides the best solution, leaving little of the legal uncertainly currently plaguing remix. Compulsory licensing will also allow both remix artists and copyright owners to realize the growing potential for profits and synergies, which are currently unavailable because the style of music is illegal. The profit potential of remix is thus both a reason the current system is flawed and an impetus to change it.

In making the case for compulsory licensing, this Note proceeds as follows: Part II traces relevant developments throughout the history of American copyright law. Part III offers a definition of remix for use in the rest of the Note and explains how this new form of musical creativity creates a challenge for the copyright regime. Part IV summarizes the law as it currently applies to remix and explains the catch-22s it poses, while Part V proposes a change to the regime that will solve many of these problems.

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14. *See id.* (noting Martin's surprise that his remix was approved).

15. *Id.*

16. *See* JOSEPH HELLER, CATCH-22, at 46 (Simon & Schuster 1955) (coining the phrase "catch-22"); *see also* 2 THE OXFORD ENGLISH DICTIONARY 973 (2d ed. 1989) [hereinafter OXFORD ENGLISH DICTIONARY] (attributing the phrase "catch-22" to Heller and defining it as a "law or regulation containing provisions which are mutually frustrating").

II. The History of American Copyright Law

A proposal to change copyright first requires a brief survey of its history. This Part will trace copyright law's history of evolving in response to various technological changes and explain the nature of two separate copyrights in recorded music: one in the recording itself and one in the musical work underlying that recording.

When the United States Constitution was revealed in Philadelphia in September of 1787,[17] it expressly gave Congress the power "[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."[18] The Founding Fathers were concerned enough with the public good to be derived from science, manufacturing, and art to provide specifically for the encouragement of these endeavors by giving Congress the power to create intellectual property rights.[19] The Constitution specifically aims to encourage art; securing profits is merely a method of achieving that end.[20] "[The] limited grant [in the Copyright Clause] is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward . . . ."[21]

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17. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION 5 (2005) (describing the language of the Constitution as a proposal that "emerged from a special conclave held in Philadelphia during the summer of 1787 . . . signed by thirty-nine of the continent's most eminent men").

18. U.S. CONST. art. I, § 8, cl. 8; *see also* 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 22–25 (1994) (describing the intellectual property clause's origins in committee over the summer of 1787 and how it was adopted by the Convention without debate).

19. *See* THE FEDERALIST NO. 43, at 243 (James Madison) (Am. Bar Ass'n 2009) (arguing that inventions and artistic creations will serve the public good if they are protected as intellectual property).

20. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (Matthew Bender ed., supp. 2010) [hereinafter NIMMER] ("[T]he authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors, and that the copyright monopoly is a necessary condition to the full realization of such creative activities."); EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 89–90 (2002) (arguing that the clause is unique among parts of the Constitution in that it provides not only a purpose—to give Congress the authority to promote science and arts—but also the particular means of accomplishing that purpose—through intellectual property rights).

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

Congress did not waste time exercising its Constitutional grant of power—it passed the country's first copyright act in 1790.[22] This statute gave authors a legally protected "sole right and liberty of printing, reprinting, publishing and vending" of their works for a limited period of time.[23] The Act secured these rights by providing that any unauthorized copies made by others would be forfeit and subject to a fine paid to the true author.[24]

Over time, Congress has responded to new technologies and societal changes by repeatedly amending the copyright statute in order to keep the law clear, current, and relevant.[25] For instance, in 1831 the copyright statute was amended to protect musical compositions specifically.[26] Compositions are the songs themselves—the abstract creations of musicians which can be fixed in the form of musical notation on paper.[27] Before this amendment, musical compositions were protected only under the catchall protection for "books."[28]

A musical composition copyright gives the owner the right to make copies of the work, distribute those copies, perform the work publicly, and prepare derivative works[29]—works based on the

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22. *See* Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (amended 1976) (granting protection to authors of books, maps, and charts for a period of fourteen years followed by another fourteen year renewal period).

23. *Id.*

24. *Id.* § 2, at 124–25.

25. *See* Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1856–59 (2009) (arguing that technological change creates legal uncertainty and legal delay, which, in turn, induce Congressional changes to the copyright regime); *see also* PATRY, *supra* note 18, at 36–120 (providing a detailed account of the changes in copyright law from 1790 to the present).

26. *See* Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436 (codified as amended at 17 U.S.C. § 102 (2006)) (adding "musical composition" to the protected list of "book, map, [and] chart" and extending the length of protection offered).

27. *See* 3 OXFORD ENGLISH DICTIONARY, *supra* note 16, at 625 (2d ed. 1989) (defining "composition" as "[a] musical production, a piece of music" with the following usage example: "[o]ne of Handel's compositions"). The musical composition copyright extends to "musical works, including any accompanying words." 17 U.S.C. § 102(a)(2). Thus, the separate ideas of lyrics and musical score are each protected by the copyright statute. *See* 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 2.8 (3d ed. Supp. 2010) (noting that "so long as the composition's words and music are integrated into an artistic whole, the composition's protectable elements will consist not only of the combination of music and words, but also of the music alone and the words alone").

28. *See* Clayton v. Stone, 5 F. Cas. 999, 1000 (C.C.S.D.N.Y. 1829) ("A book within the statute need not be a book in the common and ordinary acceptation of the word . . . it may be printed only on one sheet, as the words of a song or the music accompanying it.").

29. The copyright statute defines "derivative work" as "a work based upon one or

copyrighted work.[30] These rights are exclusive to the copyright owner, though the owner may license others to exercise the rights at his or her discretion.[31] However, these exclusive rights are limited in several ways.[32] For instance, fair use—a "reasonable and limited use of a copyrighted work without the author's permission"[33]—is an affirmative defense to copyright infringement originally developed by the courts and added to the copyright statute in 1976.[34] Another limit is a system that allows anyone who wants to perform and record their own version of a musical composition to obtain a license to do so.[35] This license, sometimes called the "mechanical license,"[36] is compulsory—a composer or other composition copyright holder cannot prevent it from issuing if they have previously distributed recordings of the song.[37] Despite the owner's copyright on the song, anyone who is willing to pay for a compulsory license can obtain one.[38] While few actually invoke the procedure of the mechanical license, opting for faster, private negotiations instead, it remains important because it provides a background that compels such negotiations and simplifies the licensing procedure.[39]

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more preexisting works, such as a . . . musical arrangement . . . sound recording . . . abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101.

30. *Id.* § 106.

31. *Id.*

32. *See id.* §§ 107–21 (providing various limitations on the exclusive rights of copyright owners set out in § 106).

33. BLACK'S LAW DICTIONARY 676 (9th ed. 2009); *see also infra* Part IV.A.1 (discussing the fair use defense in detail).

34. *See* 17 U.S.C. § 107 (2006) (codifying the privilege of fair use by providing a set of four factors to be weighed in determining whether the use is fair or infringing). *See generally* Folsom v. Marsh, 2 Story 100 (C.C.D. Mass. 1841) (providing an early example of judicial application of the fair use theory).

35. *See* 17 U.S.C. § 115 ("When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person . . . may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work.").

36. *See* AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 683 (3d ed. 2002) (noting that the compulsory license for compositions first emerged to prevent the granting of monopolies to companies making "mechanical reproductions" of compositions by means of rolls for player pianos, hence the name "mechanical license").

37. *See* 17 U.S.C. § 115 (requiring the party requesting the license merely to give notice of his or her intention to obtain a compulsory license and to pay statutory royalties for each copy of the record distributed, thus eliminating the need for negotiations between the copyright owner and the party seeking a license).

38. *Id.*

39. *See* KOHN & KOHN, *supra* note 36, at 683–84 (noting that "the compulsory license

In 1971, Congress extended copyright protection to sound recordings, including recordings of musical compositions.[40] Before recording technology was widespread, written compositions were the only way musical creations could be copied, so the composition copyright was the only federal copyright protection afforded to music.[41] But as technology for the copying and distribution of sound recordings had become common by 1971, Congress responded to the new technology by protecting recordings from unauthorized copying as well.[42] The composition copyright protected the trade of composing music; the new copyright for recordings was enacted to similarly protect the recording industry by allowing it to operate without the concern of pirated copies of records.[43] Under the copyright act as amended in 1971, individuals or entities could own a copyright in a musical composition as well as in a recording of that composition.[44] While composers and music publishers often continued to own the rights to their compositions, record companies could now own the rights to recordings of those compositions.[45] This new sound recording

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has served to simplify the process of obtaining mechanical licenses and has reduced a significant amount of unnecessary transaction costs").

40. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. § 102 (2006)).

41. Some states, however, did offer protection for sound recordings by statute prior to 1972. *See* 3 GOLDSTEIN, *supra* note 27, § 17.14.2 (stating "[u]ntil Congress granted copyright protection to sound recordings in . . . 1971, record manufacturers found relief against record piracy in state misappropriation law" and providing citations to relevant cases).

42. *See* Act of Oct. 15, 1971, Pub. L. No. 92-140, pmbl., 85 Stat. 391, 391 (codified as amended at 17 U.S.C. § 102 (2006)) (providing that the act is "for the purpose of protecting against unauthorized duplication and piracy of sound recording").

43. *See* PATRY, *supra* note 18, at 74 ("The 1971 Sound Recording Act was rooted in concerns over piracy . . . ."). Note that "piracy" in this context means the making and selling of physical copies of records, rather than the music industry's modern usage of piracy as synonymous with online file-sharing. *See* LAWRENCE LESSIG, FREE CULTURE 62–79 (2004) [hereinafter LESSIG, FREE CULTURE] (distinguishing Internet music piracy from traditional piracy and arguing that not all forms of Internet copyright violation should be considered true piracy).

44. *See* 17 U.S.C. §§ 101–102 (2006) (defining sound recordings separately from musical works); 1 GOLDSTEIN, *supra* note 27, § 2.13 ("Sound recordings are distinct from the underlying literary dramatic or musical works whose performance they may embody. . . . [A] singer's recorded performance of a song [and other types of recordings] all constitute sound recordings and, as such, are copyrightable works separate from the . . . song that is performed.").

45. *See, e.g.*, JOANNA DEMERS, STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY 12 (2006) (pointing out that, while we tend to think of copyright as a moral right—artists should be compensated for sharing what they create—this position ignores the fact that generally publishers and record labels, rather than authors, own

copyright did not include a compulsory licensing procedure like the one in place for the composition copyright mainly because, at that time, the only person who would want to copy a recording would be a pirate.[46] Thus, to this day, a record company's right to duplicate the recordings it has produced may not be exercised by others without the company's permission; the protection is airtight, and, unlike compositions, copyright owners cannot be forced to grant a license.[47] The sound recording copyright of 1971 and the composition copyright of 1831, combined with a few other provisions,[48] provide what we think of today as copyright protection for music.

III. A New Challenge for the Copyright Regime

The copyright protection just described is designed for traditional forms of music. However, new types of music that are based on "sampling" have now emerged. This Part defines "remix" by exploring the history of sampling and showing how it has evolved into two different types of sample-based music: traditional, hip-hop sampling and remix. It concludes by showing that remix music is not adequately dealt with by current copyright law.

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copyrights to their works).

46. *See* 17 U.S.C. § 115 (limiting the "scope of exclusive rights in nondramatic musical works" but saying nothing about the scope of exclusive rights in sound recordings); RICHARD SCHULENBERG, LEGAL ASPECTS OF THE MUSIC INDUSTRY 512–14 (2005) (noting the contrast between § 115, dealing with compositions, and § 114, dealing with recordings, and explaining that § 114 does not subject sound recording copyrights to compulsory licenses).

47. *See* 17 U.S.C. § 115(a)(1) ("A person may not obtain a compulsory license for . . . duplicating a sound recording fixed by another, unless: (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording . . . ."). For a helpful illustration, see MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 313 (4th ed. 2005) (imagining C, a composer, who authorizes A to record and distribute a song he composes, B another musician who then uses the compulsory license to record his own version of the song, and D who wants to use the recording of A or B's version of the song). Under Leaffer's example, B has no problem compelling a license to record his own version of the song, but D must either obtain the consent of A or B to use their recordings or must record his own version, because he can only compel a license for C's composition, not for A or B's recording. *Id.*

48. *See, e.g.*, 17 U.S.C. § 114 (providing for broadcast licensing, online webcasting licensing, and other limitations on the exclusive rights in sound recordings).

A. What is "Remix?"

1. A Brief History of Sampling-Based Music

Sampling is "[t]he process of taking a small portion of a sound recording and digitally manipulating it as part of a new recording."[49] The process of sampling allows musicians to build on the creations of those who came before them in a way that has new meaning, much as musicians have done with more traditional methods of musical appropriation for hundreds of years.[50] As Rosemary Coombe recognizes, "perhaps no area of human creativity relies more heavily upon appropriation and allusion, borrowing and imitation, sampling and intertextual commentary than music, nor any area where the mythic figure of the creative genius composing in the absence of all external influence is more absurd."[51] Sampling is merely the newest method of such musical appropriation. It emerged along with new technology, first appearing as a form of musical allusion in Jamaica in the 1960s in compositions known as "dubs."[52] Eventually, sampling found its way to the United States and gained widespread acceptance in American hip-hop music.[53]

At first, the legal repercussions of sampling were largely ignored.[54] In fact, groups like the Beastie Boys and Public Enemy created much of their

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49. BLACK'S LAW DICTIONARY, *supra* note 33, at 1458; *see also* RONALD S. ROSEN, MUSIC AND COPYRIGHT 568 (2008) ("The word 'sample' is used because this practice usually involves a brief snippet from a sound recording that is then used in another recording, usually for an effect desired by the creator of the second recording.").

50. *Cf.* Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) ("In 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 . . . use much which was well known and used before."); ROSEN, *supra* note 49, at 161 (discussing the way Bach and Mozart built on creations of those who came before them).

51. Rosemary Coombe, *Foreword* to JOANNA DEMERS, STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY ix (2006).

52. *See* JEFF CHANG, CAN'T STOP, WON'T STOP: A HISTORY OF THE HIP-HOP GENERATION 30 (2005) (tracing the beginning of sampling to Jamaican DJs).

53. *See id.* at 41–85 (describing the migration of sampling from Jamaica to the Bronx and its importance in early hip-hop).

54. *See* SCHULENBERG, *supra* note 46, at 532–33 (arguing that "it took a damnably long time for sampling to be held to be infringement"); William Y. Durbin, Note, *Recognizing the Grey: Toward a New View of the Law Governing Digital Music Sampling Informed by the First Amendment*, 15 WM. & MARY BILL RTS. J. 1021, 1026–28 (2007) (tracing the history of sampling to the 1960s and 1970s and noting that courts only began to address the issue of sampling "head-on" in the early 1990s). *Cf.* Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183–85 (S.D.N.Y. 1991) (finding, for the

sample-heavy music "when record companies were paying less attention to these legal issues."[55] Eventually, courts began to recognize unlicensed sampling as copyright infringement.[56] Nevertheless, judicial decrees have often been vague and contradictory.[57] Increasingly rapid technological and artistic change over the past decade has made this legal uncertainty even more frustrating.[58] As sampling has grown more common and musically complex, traditional copyright analysis has become more difficult to apply, resulting in unpredictability.[59]

2. Modern Sampling

Modern uses of sampling fall roughly into two groups: hip-hop and remix. Hip-hop was the first widespread use of sampling and often continues to follow a very traditional model.[60] It is a conventional use of sampling in that it usually involves a studio producer appropriating a prior work and passing it off as the basis of a new song.[61] But hip-hop is no

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first time, that unlicensed sampling is copyright infringement).

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

56. *See Grand Upright Music*, 780 F. Supp. at 183 (citing the Old Testament as legal precedent and concluding that "stealing" music by sampling is copyright infringement).

57. *Compare* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 594 (1994) (holding, on its specific facts, only that the use was not presumptively unfair and remanding to district court for the actual fair use analysis), *with* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005) (adopting an interpretation of "[g]et a license or do not sample"). Even the *Campbell* case eventually settled out of court, "leaving no recent precedents defining the scope of fair use." DEMERS, *supra* note 45, at 120.

58. *See* LESSIG, FREE CULTURE *supra* note 43, at 173 ("The opportunity to create and transform becomes weakened in a world in which creation requires permission and creativity must check with a lawyer.").

59. *See, e.g.*, Aaron Power, Comment, *15 Megabytes of Fame: A Fair Use Defense for Mash-Ups as DJ Culture Reaches its Postmodern Limit*, 35 SW. U. L. REV. 577, 579–86 (2007) (explaining how "mash-ups" are musically different from previous sampling-based genres and how, accordingly, "traditional sampling analysis is of little use with respect to mash-ups").

60. *See, e.g.*, Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183–85 (S.D.N.Y. 1991) (considering Biz Markie's use of a brief sample from a Gilbert O'Sullivan song as the basis of his song).

61. David M. Morrison, Bridgeport *Redux: Digital Sampling and Audience Recoding*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 75, 95 (2008) (describing a "derivative works sampling paradigm involv[ing] the use of a single, or relatively small number of recognizable samples that are quantitatively and/or qualitatively significant in terms of both the original source and the new recordings, and which . . . violate[s] traditional copyright . . . principles in the absence of a license"). Morrison gives, as examples, "Vanilla Ice's *Ice Ice*

longer the only type of music that uses sampling.[62] The second type of sampling-based music that has emerged, remix, is more like a collage.[63] It is usually made with powerful software on personal computers that allows users to stretch and twist several recordings, mix them together, and create a new piece of music consisting of pre-existing recorded sounds.[64] Some remix artists even continue to use turntables to achieve the same effect. Because both cases and commentary have primarily addressed hip-hop,[65] this Note concerns itself with remix.

This Note uses the phrase "remix" as an umbrella term for the second category of sampling-based music. Remix music is part of what Lawrence Lessig calls "remix culture" or "read/write culture."[66] It is music in which the artist composes by absorbing the music around him—the reading part—and putting various songs together to create something new—the writing part.[67] It is similar to "sounds being used like paint on a palette . . . [b]ut all the paint has been scratched off of other paintings."[68] By its nature, remix necessarily copies and uses existing recordings, but it uses them in a new way rather than leaving them largely unchanged and passing them off as a

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Baby, which looped a sample of the rhythm section from the David Bowie and Queen song, *Under Pressure*; and Puff Daddy's *I'll Be Missing You*, which samples elements of instrumentation from The Police's *Every Breath You Take*." *Id.*; *see also* JOSEPH G. SCHLOSS, MAKING BEATS: THE ART OF SAMPLE-BASED HIP-HOP 136–44 (2004) (describing how hip-hop producers select and use only a few samples per song, repeating, or "looping," each sampled sound in order to create the foundation of the new hip-hop record).

62. *See* 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, 285 (2009) ("Terming sampling a purely hip hop practice is misguided.").

63. *See* Morrison, *supra* note 61, at 96 (describing a "collage paradigm" which refers to "the layered use of quantitatively and/or qualitatively insignificant samples to create new musical works that bear little or no resemblance to the original work").

64. *See id.* ("Artists who sample according to the collage paradigm rely on the ability of modern samplers to chop up samples, rearrange them, alter their pitch, tone, rhythm, and sequencing in order to modify what is taken and create something altogether new.").

65. *See, e.g.*, *Grand Upright Music*, 780 F. Supp. at 185 (considering sampling in the case of a hip-hop song); Michael L. Baroni, *A Pirate's Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65, 93–100 (1993) (proposing a compulsory licensing scheme for samples used in hip-hop); David S. Blessing, Note, *Who Speaks Latin Anymore?: Translating De Minimis Use for Application to Music Copyright Infringement and Sampling*, 45 WM. & MARY L. REV. 2399, 2404–05 (2004) (discussing the increasing prevalence of sampling in hip-hop and other forms of popular music).

66. *See* LAWRENCE LESSIG, REMIX 28–31 (2008) [hereinafter LESSIG, REMIX] (defining "read/write" culture in contrast to "read only" culture).

67. *See id.* at 69–70 (describing the creation and character of remix).

68. *Id.* at 70.

novel part of the new song, as in hip-hop.[69] While hip-hop sampling almost always allows listeners to recognize the original song, samples in remix may or may not be recognizable.[70] Samples in remix also may or may not be combined with new, original content that adds to the sampled content.[71] Remix may create a new song from constituent parts that the listener knows nothing about, it may rely on savvy listeners in whose minds the original songs will be evoked thus giving the new song additional meaning, or it may involve some combination of the two.[72] Finally, hip-hop artists usually use sampling as merely one of several tools; instead of using a sample as the basis of their song, they may choose to record entirely new music using traditional musicians.[73] Remix artists, by contrast, must always use samples; they are the very medium from which remix is created.[74] Thus, remix is a broad category of music, but the distinction between remix and hip-hop is nevertheless a large one. This artistic distinction is also legally significant because sampling case law deals entirely with hip-hop songs.[75]

Remix has emerged quickly, and the distinctions between its various sub-genres are still somewhat blurry: "Mash-ups," "mixtapes," and "laptop music" are just a few types of remix.[76] However, the focus of this Note is

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69. *See supra* notes 60–63 and accompanying text (drawing a distinction between hip-hop and remix).

70. *See* Morrison, *supra* note 61, at 95–96 (noting that hip-hop often involves sampling in which the original song is recognizable, while in the "collage paradigm," the sampled original might not be recognizable).

71. *Cf.* Levine, *supra* note 55, at E1 (discussing how one remix artist adds no original content to his songs).

72. *See* LESSIG, REMIX, *supra* note 66, at 92–97 (arguing that "it takes extraordinary knowledge about a culture to remix it well . . . each second is an invitation to understand the links that were drawn . . . the form makes demands on the audience").

73. *See* SCHLOSS, *supra* note 61, at 63–78 (comparing and contrasting the use of samples and live instrumentation in hip-hop).

74. *See* LESSIG, REMIX, *supra* note 66, at 92–97, 74–76 (arguing that remix depends on sophisticated audiences who will understand cultural references and on references whose "meaning comes not from the content of what they say; it comes from the reference [itself], which is expressible only if it is the original that gets used"); Ashtar, *supra* note 62, at 307 (debunking the myth that, instead of sampling, artists could recreate recordings in the studio using a mechanical license by pointing to practical problems with this course of action and arguing that "the actual act of sampling from original source material has artistic merit").

75. *See infra* notes 170–219 and accompanying text (discussing cases that involve derivative works sampling).

76. Defining the exact boundaries of any musical genre with precision is a difficult proposition, but various scholars have dealt with one or more subsets of remix. "Mash-ups," for example, have been defined as a type of sampling that "typically consist[s] of a vocal track from one song digitally superimposed on the instrumental track of another" creating "new songs that are at once familiar yet often startlingly different." Pete Rojas, *Bootleg*

broader than any particular category of remix. It is an attempt to demonstrate that just as this creativity defies exact musical classification, it also resists the outdated restrictions placed on it by copyright law. Within the broad genre this Note terms "remix," the distinctions between various musical genres may be significant to a musicologist, but they are not in the eyes of the law.[77] As technology has led to more complex genres of music, the law has remained the same. Traditional copyright has become more restrictive, which, in turn, has resulted in greater limits on creativity.[78] The emergence of remix has provided a strong example of the confusion inherent in applying copyright law designed for traditional culture to modern, digitally influenced culture.[79]

The example of one of the more popular remix artists is instructive. In June of 2008, an artist named Girl Talk released his album *Feed the Animals* to critical acclaim and thousands of Internet downloads.[80] Girl Talk, whose real name is Gregg Gillis, creates "danceable musical collages out of short clips from other people's songs; there are more than 300 samples on '*Feed the Animals*.'"[81] "[H]e samples, blends, loops, recombines, and reconstitutes the popular music of the past fifty years or so into strange and beautiful new creations. . . . [S]omething that sounds a little like all the artists he samples and, at the same time, nothing like any of

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Culture (Aug. 1, 2002), http://dir.salon.com/tech/feature/2002/08/01/bootlegs/ index.html (last visited Mar. 22, 2011) (on file with the Washington and Lee Law Review). "Mixtapes," meanwhile, have been described as "more diverse and difficult to define than ever. . . . [A] mix of authorized original music, hit tracks used without permission, or blended tracks whose original songs are only identifiable to a discerning ear." Meredith L. Schantz, *Mixed Signals: How Mixtapes Have Blurred the Changing Legal Landscape in the Music Industry*, 17 U. MIAMI BUS. L. REV. 293, 297 (2009). "Laptop music" is another term occasionally used for digital musicians and DJs who use computers in live shows. *See infra* notes 80–96 and accompanying text (discussing laptop artist Girl Talk).

77. *Cf.* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (providing Justice Holmes's famous admonition that judges should not make artistic determinations).

78. *See supra* note 3 and accompanying text (discussing the limits imposed on modern creativity by intellectual property laws).

79. *See supra* notes 57–59 and accompanying text (providing an overview of the legal complication and confusion caused by remix).

80. *See, e.g.*, Levine, *supra* note 55, at E1 (discussing the album's release and distribution); Ryan Dombal, *Album Review: Girl Talk, Feed the Animals*, PITCHFORK (June 27, 2008), http://pitchfork.com/reviews/albums/11937-feed-the-animals/ (last visited Mar. 22, 2011) (giving the album an 8 out of 10 and declaring Girl Talk "the supreme 80s-baby pop synthesizer") (on file with the Washington and Lee Law Review).

81. Levine, *supra* note 55, at E1.

them."[82] Gillis says the idea is to recontextualize familiar songs for his listeners, though his samples are sometimes recognizable and sometimes not.[83] He believes that his music is similar to that of any artist who takes inspiration from other musicians.[84] Gillis claims he is not so much replaying old songs as creating something entirely new out of familiar pieces.[85] Some music critics say this remix provides a unique interpretive challenge for listeners to recognize the samples used and understand why they were chosen.[86]

While Girl Talk is far from unique,[87] he has achieved unprecedented popularity in recent years.[88] *Feed the Animals* was included in several year-end best music lists.[89] More importantly, Gillis released the album on a "pay what you want" basis, meaning he made a profit from it.[90] This has made him perhaps one of the first non-hip-hop artists to use sampling as a primary medium in a commercially successful way.[91] Such a commercial

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82. Tough, *supra* note 1.

83. Britany Salsbury, *Still Not a DJ: An Interview with Sound Artist Girl Talk*, FNEWS (Feb. 2007), http://fnewsmagazine.com/2007-feb/still-not-a-dj.php (last visited Mar. 22, 2011) (on file with the Washington and Lee Law Review).

84. *See* Andy Trimlett, *Girl Talk, The Musical Dr. Frankenstein*, KPBS (Sep. 11, 2009), http://www.kpbs.org/news/2009/sep/11/girl-talk-musical-dr-frankenstein/ (last visited Mar. 22, 2011) ("'It's like with any band—you can recognize their influence or their sources, but they're trying to take it to a new place.'") (on file with the Washington and Lee Law Review).

85. *See* Tough, *supra* note 1 ("[T]he more you listen, the more you hear the music the way Gillis intends it: as something brand-new, something that transcends its source material altogether.").

86. *See* Dombal, *supra* note 80 (describing various stages of fully comprehending Gillis's music).

87. *See id.* ("While Gillis's pile-on sampling style isn't new (see: *Paul's Boutique* [by the Beastie Boys], DJ Z-Trip, the Avalanches, 2 Many DJ's, et. al), its confluence of shamelessness and abundance is unparalleled.").

88. *See* Tough, *supra* note 1 (describing Girl Talk's live shows, which have become larger and more frequent to the point that he now "regularly sells out thousand-seat venues").

89. *See, e.g.*, Josh Tryangiel, *Top Ten Albums*, TIME (Nov. 3, 2008), http://www.time.com/time/specials/2008/top10/article/0,30583,1855948_1864324_1864335,00.html (last visited Mar. 22, 2011) (ranking *Feed the Animals* the fourth best album of the year) (on file with the Washington and Lee Law Review); *The 33 Best Albums of 2008*, BLENDER (Nov. 11, 2008), http://www.prefixmag.com/news/blenders-top-33-albums-of-2008/23294 (last visited Mar. 22, 2011) (ranking *Feed the Animals* number two) (on file with the Washington and Lee Law Review); *Rolling Stone's Top 50 Albums of 2008*, STEREOGUM, http://stereogum.com/40652/rolling_stones_top_50_albums_of_2008/list/ (last visited Mar. 22, 2011) (ranking *Feed the Animals* number twenty-four) (on file with the Washington and Lee Law Review).

90. Levine, *supra* note 55, at E1.

91. *See* David Mongillo, Note, *The Girl Talk Dilemma: Can Copyright Law*

release would be of no legal consequence if Gillis obtained permission to use the clips he employs in his songs.[92] But he does not seek approval from composers or record companies; instead he believes that copyright law's fair use doctrine applies to his music.[93] His fair use claim remains untested as he has not yet been sued.[94] Some believe this is because of record labels' fear of losing in court and creating precedent too favorable to remix artists.[95] Others claim that the courts are unlikely to find any sampling to be fair use.[96] Either way, Gillis's music provides a prominent example of the gap in the law in which remix currently exists.

3. Why Should We Care About Remix?

This failure of copyright law to deal with remix is important for several reasons. Lawrence Lessig argues in his recent book, *Remix*, that remix music actually existed in different forms for years before sampling.[97] He points to John Philip Sousa's testimony before Congress in 1906, in which Sousa argued that music has always been an interactive art that requires not just passive consumption but also active participation from the public.[98] Lessig argues that teenagers in particular are simply consuming and commenting on culture in ways that seem perfectly natural to them.[99]

Accommodate New Forms of Sample-Based Music?, 10 U. PITT. J. TECH. L. & POL'Y 3, 15 (2009) ("[O]ne factor distinguishes Girl Talk from almost all other current mash-up projects: Girl Talk's music is sold commercially . . . .").

92. Levine, *supra* note 55, at E1.

93. *Id. See also infra* notes 137–59 and accompanying text (providing an explanation of the fair use defense to copyright infringement).

94. Levine, *supra* note 55, at E1.

95. *See, e.g.*, *id.* ("It may not be in the interests of labels or artists to sue Mr. Gillis, because such a move would risk a precedent-setting judgment in his favor, not to mention incur bad publicity."); David Bollier, *Is Fair Use Regaining Its Mojo?*, ONTHECOMMONS.ORG (Aug. 10, 2008), http://www.onthecommons.org/content.php?id=2148 (last visited Mar. 22, 2011) (suggesting that fear of a bad court decision may be keeping copyright owners from challenging fair use claims) (on file with the Washington and Lee Law Review).

96. *See, e.g.*, Morrison, *supra* note 61, at 141 (arguing that recent precedent compels a finding that collage paradigm music, such as Girl Talk's, is illegal copyright infringement).

97. *See generally* LESSIG, REMIX, *supra* note 66.

98. *See id.* at 23–27 (recalling Sousa's prediction that gramophones would make it too easy to hear music, thus stripping music of its democratic nature by causing amateur musicians to disappear and people to become unable to reinterpret and perform in their own way the popular songs of the day).

99. *See id.* at 106–14 (pointing out that America's youth have grown up with computers and that when technology allows them to do something, it seems perfectly natural

Remix culture, he points out, is not very novel; the only new part is quoting with media instead of text, a distinction that invokes different copyright treatment.[100]

Perhaps more importantly, remix provides an increasing potential for profit and synergies[101] that is not realized because of an over-regulation of the market.[102] In a time where turntables for disc jockeys can outsell electric guitars, it is clear that young musicians are increasingly looking to new forms of creativity.[103] Remix music has even begun appearing on Pop radio, with artists such as DJ Earworm making appearances on Top 40 stations. But copyright law provides significant barriers to entry to this new market, and the law is too often "a means of control, rather than a means of profit."[104] Copyright law allows owners to prevent the entry of a new product into the market, and this ultimately hurts both creativity and the American economy.[105] Individual judgments regarding the artistic value of this music are largely legally irrelevant.[106] Instead, remix should be seen as important because of its increasing popularity and profit potential for an ailing music industry.[107]

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to them that the law should allow it as well).

100. *See id.* at 68–83 (analogizing remix culture to textual writing using quotations and pointing out that because text is now the medium of the elite, quotation with other types of media should be legalized for average Americans).

101. *See* Ashtar, *supra* note 62, at 314 (arguing that both the sampled work and the remix work can benefit from musical "cross-pollination").

102. *See* LESSIG, FREE CULTURE *supra* note 43, at 188 ("The charge I've been making about the regulation of culture is the same charge free marketers make about regulating markets.").

103. J.C. Herz, *Game Theory; Making Music Without the Instruments*, N.Y. TIMES, Jan. 20, 2000, at G12.

104. Shachtman, *supra* note 10.

105. *See* LESSIG, FREE CULTURE, *supra* note 43, at 173 (arguing that copyright as a property right has become "unbalanced, tilted toward an extreme"); Ashtar, *supra* note 62, at 263 ("A practice that should be burgeoning due to a cultural and technological revolution, sampling is being smothered—with Congressional and judicial fiat—by opportunistic rights holders who are seldom the authors of the protected works.").

106. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (indicating a longstanding belief that courts should not make artistic value judgments and noting "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [art]"); SCHULENBERG, *supra* note 46, at 499 (noting that copyright analysis has "no legal requirement that the work in question have any artistic merit at all").

107. *Cf.* LESSIG, REMIX *supra* note 66, at 249 (arguing that as remix culture grows, the "incentive of the market [should be allowed to] drive a market reform to make this form of expression allowed"); Eric Pfanner, *Music sales worldwide fall by 7 percent*, N.Y. TIMES, Jan. 15, 2009, http://www.nytimes.com/2009/01/15/technology/15iht-digital.4-408839.html

B. New Technology, Old Creativity

Although copyright law has adapted to new technologies in the past, in recent years it has failed to keep up.[108] Traditional copyright protection depends on outdated assumptions about musical creativity.[109] These are perhaps best seen in the context of the compulsory license. The compulsory process for composition licensing allows for the idea of "covering"—the process of recording a new version of an existing song.[110] A musician can cover any song written and recorded by another musician as long as the covering musician makes only moderate stylistic changes.[111] Any cover recorded has then both made licensed use of the existing composition copyright and created a brand new recording copyright in itself.[112] "The thinking behind the compulsory license is that music should be made available to the public. Without the compulsory license provisions, the copyright owner of a musical work could retain a monopoly on recordings of the musical work."[113]

When the recording copyright was created, there was no similar need to include a compulsory license for sound recordings: Recording a cover still only required a license for the composition, not the recording.[114] In

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(last visited Mar. 22, 2011) (noting the continuing decline in revenue from music sales) (on file with the Washington and Lee Law Review).

108. *See* LESSIG, FREE CULTURE, *supra* note 43, at 194 ("[W]hen new technologies have come along, Congress has struck a balance to assure that the new is protected from the old. . . . But that pattern of deference to new technologies has now changed with the rise of the Internet.") Furthermore, "both the courts and Congress have imposed legal restrictions that will have the effect of smothering the new to benefit the old." *Id.*

109. *Cf. id.* at 136–40 ("[I]t is clear that the current reach of copyright was never contemplated, much less chosen, by the legislators who enacted copyright law."); Ashtar, *supra* note 62, at 269 ("The current licensing regime is muddled, as neither the Copyright Act nor the Sound Recording Act was written with sampling in mind.").

110. *See* Rahmiel David Rothenberg, *Sampling: Musical Authorship Out of Tune with the Purpose of the Copyright Regime*, 20 ST. THOMAS L. REV. 233, 247 (2008) ("The mechanical licensing scheme for musical compositions allows artists to perform another's musical composition, i.e. perform 'covers,' with the remuneration being received by the copyright holder of the original work.").

111. *See* 17 U.S.C. § 115(a)(2) (2006) ("A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work . . . .").

112. *See* NIMMER, *supra* note 20, § 2.10[A] (concluding that a sound recording produced pursuant to a compulsory license is eligible for its own sound recording copyright).

113. SCHULENBERG, *supra* note 46, at 512.

114. *See supra* notes 110–11 and accompanying text (explaining how compulsory licenses allow musicians to record covers of other peoples' compositions).

fact, anyone can imitate an existing recording perfectly, endeavoring to make an exact, identical recording, and still not infringe on the recording copyright so long as she is actually making a new recording with her own musicians.[115] Therefore, no reason for a similar compulsory license for recording copyrights existed; the only reason anyone would want to copy a recording would be to distribute identical copies in direct competition with the copyright owner without incurring the cost and effort of recording a cover.[116] Such a use would clearly be inconsistent with the purpose of the sound recording copyright.[117] Over time, however, technology has made copying of recordings not only significantly easier, but also full of creative possibilities where there once were none. Now, copying a recording is not necessarily piracy; instead copying can be used to make something creative.[118] Yet, the outdated assumptions of copyright law remain the same. "Technology means you can now do amazing things easily; but you [can't] easily do them legally."[119]

Despite the failure of copyright law to recognize it, remix is more similar to traditional music than many realize.[120] As Lessig and Sousa argue, "sampling" has, in essence, existed for hundreds of years in classical, jazz, and rock music.[121] Just as all musicians allude to music that came

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115. *See* 17 U.S.C. § 114 (providing that the rights granted to a recording copyright owner "do not extend to [preventing] 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"); *see also* United States v. Taxe, 380 F. Supp. 1010, 1014 (C.D. Cal. 1974), *aff'd*, 540 F.2d 961 (9th Cir. 1976) ("If the work is produced by imitation or simulation by the hiring of other musicians, or even the same musicians, to perform the copyrighted work in as similar a manner as possible, there is no infringement.").

116. *See* H.R. REP. NO. 92-487, at 4 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1569–70 (expressing the concern that including a compulsory license in the recording copyright bill would allow musicians to escape costs such as hiring their own musicians and paying for studio time).

117. *See supra* note 42 and accompanying text (explaining that piracy was the major concern motivating the extension of copyright protection to recordings).

118. *See* LESSIG, REMIX, *supra* note 66, at 51–83 (describing a new type of "read/write" culture in which technology allows media, including music, to be quoted, combined, and "remixed" just as easily as literary sources can be quoted and brought together in order to make an entirely new written work).

119. LESSIG, FREE CULTURE, *supra* note 43, at 105.

120. *See* DEMERS, *supra* note 45, at 4–9 (discussing the importance of "transformative appropriation" throughout the history of music).

121. *See, e.g.*, ROSEN, *supra* note 49, at 161 (discussing appropriation and allusion in classical music); Rothenberg, *supra* note 110, at 240–41 ("[S]ampling is just a form of musical borrowing; a long-established musical practice.").

before them—just as covering musicians use existing compositions—remix artists use existing recordings.[122] As David Morrison argues, "[t]here is relatively little difference between the significant use of a recognizable sample . . . and a cover created under the compulsory license provisions of § 115 of the Copyright Act."[123] It seems widely agreed that the composition compulsory license is beneficial, yet it has not been extended from covers to samples.[124] "Musicians encounter a relatively straightforward licensing procedure if they wish to release sound-alike versions of their favorite recordings. But the reuse of a recording, if allowed at all, can cost dearly and those who reuse without permission risk legal penalties."[125] Given the importance of appropriation and allusion throughout the history of music, there seems to be no reason for denying compulsory licenses for recordings to remix artists while granting them for compositions to covering artists.[126] Why should a musician be allowed to cover the Beatles but not remix them?[127]

C. Presumptive Infringement

The cover band analogy goes further: Anyone can cover a song in their own garage and no one will try to prosecute them; they will generally only incur liability by commercially releasing an unlicensed recording of the cover.[128] But this is not the case with remixers, because any copy made of a sound recording, even for amateur experimentation on a laptop, is per

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122. *See* Morrison, *supra* note 61, at 96 ("Cover songs have long been a staple of popular music and there seems to be no persuasive justification for considering works created under the derivative works paradigm to be significantly different qualitatively from those created under the compulsory license."). Morrison's analogy to covers seems equally applicable to his collage paradigm, because collage paradigm music represents even smaller infringements on the original song than derivative works paradigm music. *Id.*

123. *Id.*

124. *See* Ashtar, *supra* note 62, at 271 (stating that the compulsory license "benefits composers, performers, and rights holders in terms of payment and/or exposure").

125. DEMERS, *supra* note 45, at 72.

126. *Cf.* Rothenberg, *supra* note 110, at 234 ("American courts and legislatures have refused to fully recognized [the] dialogical nature of creation . . . . [The] copyright regime must not only recognize a wider conception of artistic creation, but also must align such conception with the purpose of the copyright regime.").

127. *See supra* notes 10–14 and accompanying text (discussing the disparate treatment of the Beatles' compositions and recordings).

128. *See* 17 U.S.C. § 106 (2006) (granting a right, subject to the restrictions of compulsory licensing, to control only *public* performances of a copyrighted musical work).

se copyright infringement.[129] Because remix engages in literal taking, it is, by nature, presumptive infringement.[130] To make matters worse, copyright owners now use the Internet to track down the most innocuous of infractions; no infringement is too small.[131] Thus, in order to avoid becoming a copyright infringer and having to defend in court, a remix musician absolutely must obtain a license from both the composition owner and the recording owner.[132]

Today, despite one of the most dramatic technological changes in history—the rapid, worldwide spread of personal computing and the Internet—Congress has not responded to evolving technology, allowing copyright law to become sorely outdated.[133] Legislators have simply failed to recognize that many people who are "infringing" on copyrights are doing so to make something creative. Only an antiquated legal distinction separates these remix artists from musicians who can legally record covers.[134] Remix may be artistically akin to the recontextualizing done by a

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129. *See id.* (providing protection against copying by granting the copyright owner the exclusive right to reproduce a copyrighted work); Rothenberg, *supra* note 110, at 238 ("[B]ecause sampling involves a literal taking, valid copyright ownership and proof of copying are usually not contentious issues in sound recording infringement claims.").

130. *See, e.g.*, Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 799–800 (6th Cir. 2005) (determining that unlicensed sampling is per se prohibited by statute); Power, *supra* note 59, at 590 (arguing that the remix sub-genre of mash-ups are "invariably infringing").

131. *See, e.g.*, Lenz v. Universal Music Corp., No. C 07-3783 JF (RS), 2008 WL 4790669, at *1 (N.D. Cal. Oct. 28, 2008) (providing a case in which the copyright owner of a Prince recording brought suit demanding the removal of a YouTube video of a toddler dancing to a few seconds of the recording). In the *Lenz* case, the song was not remixed in any way, was barely audible, was of poor quality, and served merely as background music. *Id.* Yet some believers in strong copyright protection have gone so far as to declare that "courts should not be allowed to fashion a fair use determination simply because the infringer is a mother with young children." William Henslee, *You Can't Always Get What You Want, But if You Try Sometimes You Can Steal it and Call it Fair Use: A Proposal to Abolish the Fair Use Defense for Music*, 58 CATH. U. L. REV. 663, 696 (2009); *see also* LESSIG, FREE CULTURE *supra* note 43, at 48–52 (describing the case of a college student who unwittingly exposed himself to over $15 million in liability merely by creating a network search engine that people used to download, among other things, music files).

132. *Cf.* Ashtar, *supra* note 62, at 268–69 (discussing the example of a recording rights holder and a composition rights holder that work together to litigate against anyone who does not clear licenses for both copyrights).

133. *See* LESSIG, REMIX, *supra* note 66, at 253 (arguing that "the form and reach of copyright law today are radically out of date").

134. *See* KOHN & KOHN, *supra* note 36, at 697 (noting that a composition compulsory license "[i]nterestingly . . . would not be available to a person seeking to use a digital sample of another's copyrighted work in a way that would change the basic melody or fundamental character of the song from which the sample was taken"); *supra* note 46 and accompanying

band covering an old song in its own unique style, but it is legally very different. What are remix artists to do to avoid automatic copyright liability?

IV. The Remix Artist's Catch-22

Remix artists have two choices for releasing their music under the current copyright scheme: Attempt to obtain the required licenses or do nothing and rely on affirmative defenses to copyright infringement. As this Part will demonstrate, both options are flawed. Together they place remix artists in a legal catch-22 that is likely to limit the amount of new music created.

A. Inadequacies of the Defenses

Scholars have argued that remix musicians should be able to avail themselves of the defenses to copyright infringement.[135] As this Part shows, however, the two major defenses, fair use and de minimis use, are each too uncertain to be truly helpful for remix artists.[136]

1. The False Promise of Fair Use

Fair use is a "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without consent, notwithstanding the monopoly granted to the owner."[137] For example, the use of an excerpt from a copyrighted song or book in a review of that work is usually considered fair.[138] The copyright statute provides that uses such as education, news reporting, and critique are fair uses.[139] This list is not meant to be exhaustive, however, and fair use may apply in any number of

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text (pointing out that recordings are not subject to compulsory licensing).

135. *See, e.g.*, *infra* note 248 and accompanying text (noting the arguments of supporters of fair use for remix).

136. *See infra* notes 258–60 and accompanying text (discussing the uncertainty of mounting an infringement defense).

137. Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966) (quoting HORACE G. BALL, COPYRIGHT & LITERARY PROPERTY 260 (1944)).

138. *See* 17 U.S.C. § 107 (2006) (including criticism among listed fair uses).

139. *See id.* (listing "purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research" as fair uses).

contexts.[140] The statute does not list parody as presumptively fair, but it has long been considered a fair use.[141] In one of the most famous fair use cases, the Supreme Court ruled that a song that parodied another copyrighted song by changing the lyrics might be a fair use of the original song's melody.[142] Fair use is an equitable doctrine; as one court declared, it "permits 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."[143] Fair use, when found by the judge, provides a complete defense for someone who has otherwise infringed a copyright.[144] It is an affirmative defense,[145] but given the broad scope of modern copyright law, it is often easy for a copyright owner to establish infringement.[146] Once such an infringement is established, the burden of proving fair use is on the defendant-infringer.[147]

Application of fair use varies by context and court; the doctrine is meant to be flexible.[148] Nevertheless, Congress has directed courts to consider four factors in determining whether a given use is fair:

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

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140. *See* Campbell v. Acuff-Rose Music Inc., 510 U.S. 569, 577 (1994) ("The text employs the terms 'including' and 'such as' in the preamble paragraph to indicate the 'illustrative and not limitative' function of the examples given." (citations omitted)).

141. *See, e.g.*, Berlin v. E.C. Publ'ns., Inc., 329 F.2d 541, 545 (2d Cir. 1964) (extending the privilege of fair use to a musical parody which kept the same melody as the original song, but changed the words). *See generally* Julie Bisceglia, Paper, *Parody and Copyright Protection: Turning the Balancing Act Into a Juggling Act*, 34 COPYRIGHT L. SYMP. 1 (1987) (discussing parody's claim as a category of fair use).

142. *See Campbell*, 510 U.S. at 594 (ruling that 2 Live Crew's parody was not presumptively unfair).

143. Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980).

144. *See* 17 U.S.C. § 107 (2006) ("Notwithstanding the [exclusive rights] provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright.").

145. *See* Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 561 (1985) (explaining that the statute was drafted "as an affirmative defense requiring a case-by-case analysis"); *see also Campbell*, 510 U.S. at 590–91 (reaffirming *Harper & Row*'s characterization of fair use as an affirmative defense).

146. *See, e.g.*, Rothenberg, *supra* note 110, at 238 (explaining that the "literal taking" of sampling usually eliminates any contention that the sample is not an infringement).

147. WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 585–86 (2d ed. 1995) (concluding that fair use is not part of the plaintiff's case; rather "the burden of establishing the defense remains on the party asserting it").

148. *See, e.g.*, *Iowa State Univ. Research Found.*, 621 F.2d at 60 ("The doctrine . . . permits courts to avoid rigid application of . . . copyright . . . .").

> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[149]

While each of these factors is important, the character of the use under the first factor is often dominant, and it is frequently interpreted by courts as a matter of whether the infringing use is derivative or is transformative.[150] In other words, is the use one that takes advantage of the copyrighted material for its intended purpose without altering it, or has the material been used in such a way that it is substantially changed or added to?[151] The copyright statute gives copyright owners the exclusive right to create derivative works.[152] A derivative work is "a work based upon one or more preexisting works . . . in which a [preexisting] work may be recast, transformed or adapted."[153] By contrast, a transformative work is further removed from the original because it involves the addition of new authorship.[154] A transformative work is one that "adds value to the original . . . [and in which] the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings."[155]

Anyone who wants to create a derivative work must obtain a license to exercise this exclusive right of the copyright owner, but anyone who wants to create a work that transforms the original may rely on fair use.[156] Thus,

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149. 17 U.S.C. § 107.

150. *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111–16 (1990) (identifying truly transformative use as supportive of the first factor of fair use rather than as an infringement upon the exclusive right to derivative use).

151. *Cf.* LEON E. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 24 (1978) (describing a distinction between a copyright-infringing "reproduction of a work in order to use it for its intrinsic purpose" and fair use reproductions in which "*a second author*" makes productive use of the original material).

152. *See* 17 U.S.C. § 106 (2006) (listing the right "to prepare derivative works based upon the copyrighted work" as one of the exclusive rights of a copyright holder).

153. *Id.* § 101.

154. *See* SELTZER, *supra* note 151, at 24 (arguing that fair use "has always had to do with the use by a second author of a first author's work. Fair use has not heretofore had to do with the mere reproduction of a work").

155. *See* Leval, *supra* note 150, at 1111 (coining the phrase "transformative use" and putting it forth as a test for the fairness of a given use).

156. *See supra* notes 152–55 and accompanying text (describing the fair use right to create a transformative work as opposed to the infringing action of creating a derivative

the distinction between infringing derivative works and fair use transformative works is a useful demarcation for musicians who would reference existing works. It is somewhat of a blurry distinction, but some uses fall easily on one side or the other. For example, a musician covering another musician's composition must not make substantial changes to it because that would be a derivative work.[157] The covering musician must either stick close enough to the original to qualify for the compulsory license,[158] or create something sufficiently different from the original, such as a parody, that it is deemed transformative rather than merely derivative.[159]

2. De Minimis Infringement

Although de minimis as a defense to copyright infringement is technically separate from fair use, courts sometimes analyze de minimis and the third fair use factor—the amount and substantiality of the portion used—as similar inquiries.[160] De minimis is the general legal principle that where an infraction—in this case copyright infringement—is very small and of minor consequence, courts should consider it a nonissue.[161] Because violations may be quite small, such as a very short sample in which the sampled recording is not recognizable, courts and scholars sometimes view copyright infringement as a de minimis issue.[162]

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work).

157. *See supra* note 111 and accompanying text (explaining that compulsory licenses allow for minor stylistic changes to the licensed song, but do not grant the licensee the right to change it so far as to create a new, derivative work).

158. *Id.*

159. *See, e.g.*, *infra* notes 203–13 and accompanying text (discussing the copyright infringement case against hip-hop group 2 Live Crew and their successful claim of parody as a transformative fair use).

160. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 451 n.34 (1984) (affirming the two doctrines' "'partial marriage'" (quoting ALAN LATMAN, FAIR USE OF COPYRIGHTED WORKS 34 (1958))); Julie D. Cromer, *Harry Potter and the Three-Second Crime: Are We Vanishing the De Minimis Defense from Copyright Law?*, 36 N.M. L. REV. 261, 274 (2006) (viewing the statutory fair use provisions as a Congressional enactment of de minimis principles). For the sake of clarity, this Note separates fair use and de minimis into independent doctrines despite their considerable overlap.

161. *See* BLACK'S LAW DICTIONARY, *supra* note 33, at 496 (defining "de minimis" as something "so insignificant that a court may overlook it in deciding an issue or case").

162. *See, e.g.*, Bridgeport Music, Inc. v. Dimension Films LLC, 230 F. Supp. 2d 830, 839–41 (M.D. Tenn. 2002), *rev'd*, 410 F.3d 792 (6th Cir. 2005) (considering de minimis treatment of sampling); Cromer, *supra* note 160, at 266–81 (discussing the application of the

In the context of both de minimis and fair use, courts sometimes make an inquiry of "substantial similarity."[163] "[A]s copying is an essential element of copyright infringement, so substantial similarity between the plaintiff's and defendant's works is an essential element of actionable copying. 'This means that even where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial.'"[164] Thus, substantial similarity is sometimes seen as simply a converse inquiry to the de minimis doctrine.[165] For this reason, this Note discuses substantial similarity here, in the context of the de minimis doctrine, despite its applicability to both de minimis and fair use.

Substantial similarity is a flexible inquiry, and its application will depend somewhat on context.[166] In the remix setting, Professor Nimmer, recognizing that a new work necessarily involves an exact copy of an original work, has proposed the following test:

> The question in each case is whether the similarity relates to matter that constitutes a substantial portion of plaintiff's work—not whether such material constitutes a substantial portion of defendant's work . . . . The quantitative relation of the similar material to the total material contained in plaintiff's work is certainly of importance. However, even if the similar material is quantitatively small, if it is qualitatively important, the trier of fact may properly find substantial similarity . . . . If, however, the similarity is only as to nonessential matters, then a finding of no substantial similarity should result.[167]

Sampling is, under this view, a case of what is often called "fragmented literal similarity"—it involves an exact, literal copy but only a partial copy.[168] This taking of only part of the copyrighted work will not always

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de minimis doctrine to copyright); Jeremy Scott Sykes, Note, *The De Minimis Defense in Copyright Infringement Actions Involving Music Sampling*, 36 U. MEM. L. REV. 749, 758–72 (2006) (considering application of the de minimis doctrine to copyright infringement cases against sampling musicians).

163. *See, e.g.*, *Bridgeport Music*, 230 F. Supp. 2d at 839–41 (applying a substantial similarity test to a case of sampling).

164. NIMMER, *supra* note 20, § 13.03[A] (quoting Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004)).

165. *See id.* § 8.01[G] ("[F]or similarity to be substantial, and hence actionable, it must apply to more than simply a *de minimis* fragment. Used in this fashion, '*de minimis* copying' represents simply the converse of substantial similarity.").

166. *See id.* § 13.03[A] ("[D]etermination of the extent of similarity that will constitute a *substantial*, and hence infringing, similarity presents one of the most difficult questions in copyright law, and one that is the least susceptible of helpful generalizations.").

167. *Id.* § 13.03[A][2][a].

168. *See id.* § 13.03[A][2] (explaining that literal similarity is copying "virtually . . .

be an infringement; rather it will be up to courts to determine the substantiality of the amount taken.[169]

3. Application to Remix

The defenses initially seem helpful for remix. However, the existing law has proven to be anything but helpful; it is actually very unclear when applied to remix music. The defenses were not designed for remix, and they alone are not adequate to allow remix artists to operate freely.

Case law on fair use and de minimis use in music is highly limited in both quantity and applicability. Two cases are fairly on point, and both are strongly anti-remix. The first case to address sampling was *Grand Upright Music v. Warner Brothers Records*.[170] The *Grand Upright* court considered whether unauthorized sampling violated the composition and recording copyrights.[171] The case involved Biz Markie's sampling of an instrumental section and use of a three-word phrase from the song "Alone Again (Naturally)" by Gilbert O'Sullivan.[172] Grand Upright Music owned the copyright to both the composition and the sound recording of "Alone Again (Naturally)" and brought suit.[173] Biz Markie's use might seem like a prime candidate for de minimis treatment or fair use analysis, because it consisted of only a brief, three-word refrain.[174] However, the judge in *Grand Upright* determined that because the defendant acknowledged that his recording embodied the copied recording, "[t]he only issue . . . seem[ed] to be who

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word for word," but that such literal similarity may be fragmented in the sense that it is "not comprehensive[;] . . . the fundamental substance . . . of the plaintiff's work has not been copied; no more than a line, or a paragraph . . . has been appropriated"); Rothenberg, *supra* note 110, at 239 ("Sampling cases are clearly a species of fragmented literal similarity, where the appropriated work is an exact copy of the original work . . . .").

169. *See* NIMMER, *supra* note 20, § 13.03[A][2][a] ("It follows, then, that the determination of substantial similarity with respect to fragmented literal similarity . . . requires a value judgment."); *see also* Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) ("If so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient in point of law to constitute a piracy *pro tanto*.").

170. *See* Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 185 (S.D.N.Y. 1991) (finding willful copyright infringement and granting an injunction against the defendant, Biz Markie).

171. *Id.* at 183.

172. *Id.* at 183–85.

173. *Id.*

174. *Id.*

owns the copyright to the song 'Alone Again (Naturally)' and the master recording thereof made by Gilbert O'Sullivan."[175] Therefore, by determining that Grand Upright owned the copyrights, the judge arrived by default at the conclusion that Biz Markie had committed copyright infringement and was without a defense.[176] The opinion essentially ignored the de minimis and fair use defenses and characterized sampling as de facto theft.[177]

The Sixth Circuit reduced the impact of the de minimis defense in a more recent sampling case, *Bridgeport Music v. Dimension Films*.[178] Like the *Grand Upright* court, the *Bridgeport* court considered both the composition and recording copyrights.[179] At issue was the hip-hop group N.W.A.'s use of a sample from a Funkadelic recording.[180] The N.W.A. recording was eventually used in the film *I Got the Hook Up*.[181] As owners of the original Funkadelic song, Bridgeport Music sued Dimension Films, the film's production company.[182] The Funkadelic work opened with a four-second long, three-note guitar riff.[183] N.W.A.'s work sampled two seconds of this riff, extended the sample to seven seconds, and lowered its pitch.[184] The district court determined that a reasonable jury might find that the use of the phrase in the initial work was original and thus copyrightable but could not find, under the de minimis principle, that the new work was substantially similar to the old work.[185] The opinion declared that "even an aficionado of George Clinton's music might not readily ascertain that his music has been borrowed."[186] On appeal, however, the Sixth Circuit refused to consider a substantial similarity analysis or de minimis inquiry of any kind.[187] The court stated that "no substantial similarity or *de minimis*

175. *Id.* at 183.

176. *Id.* at 185.

177. *See id.* at 183 (admonishing "'Thou shalt not steal'" and determining that sampling is infringement per se (quoting *Exodus* 20:15)).

178. *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 798 (6th Cir. 2005) (reversing a district court's summary judgment for the defendant/sampler).

179. *Id.* at 796–98.

180. *Id.* at 796.

181. *Id.* at 795–96.

182. *Id.*

183. *Id.* at 796.

184. *Id.*

185. Bridgeport Music, Inc. v. Dimension Films, 230 F. Supp. 2d 830, 839–41 (M.D. Tenn. 2002), *rev'd*, 410 F.3d 792 (2005).

186. *Id.* at 842.

187. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 798 (6th Cir. 2005).

inquiry should be undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording" and reversed the district court.[188] The court then gave a clear directive: "[G]et a license or do not sample."[189] Several months after this decision, the court amended its opinion to allow the district court to consider fair use on remand, but there is still concern that *Bridgeport* may nevertheless influence the application of both fair use and the de minimis principle in the sampling context.[190] Critics of *Bridgeport* reject its undermining of the de minimis doctrine[191] and its conclusion that the composition compulsory license will make licenses for recordings available at a reasonable fee.[192]

Two other cases seem initially more helpful, but they are substantially less on point and do not truly apply to remix. The Ninth Circuit, in *Newton v. Diamond*,[193] found that a brief sample used several times in a new song was de minimis.[194] The plaintiff in *Newton* composed and recorded a piece

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188. *Id.*

189. *Id.* at 801.

190. Rothenberg, *supra* note 110, at 244 (discussing the court's amendment, concluding that it keeps the substantive law of fair use intact, and noting a concern that the opinion may nevertheless impact the third statutory fair use factor).

191. *See, e.g.*, Morrison, *supra* note 61, at 106–09 (noting that "the court's subsequent analysis relies heavily on a narrow interpretation of § 114 of the Copyright Act" and concluding that this interpretation is either inconsistent with the statute's plain meaning or at least inconsistent with Congressional intent if the statute is seen as ambiguous); Michael Jude Galvin, Note, *A Bright Line at Any Cost: The Sixth Circuit Unjustifiably Weakens the Protection for Musical Composition Copyrights in* Bridgeport Music v. Dimension Films, 9 VAND. J. ENT. & TECH. L. 529, 539 (2007) ("The decision that sound recordings deserve more protection [than musical compositions] can be equated with a normative judgment that musical compositions have less value . . . . This is no answer for unlicensed digital sampling. Instead of changing the rule, the Sixth Circuit should have affirmed the decision of the district court . . . ."); Jennifer R.R. Mueller, Note, *All Mixed Up:* Bridgeport Music v. Dimension Films *and De Minimis Digital Sampling*, 81 IND. L.J. 435, 451–52 (2006) (arguing that sampling does not automatically create a derivative work and thus, the court's refusal to recognize substantial similarity analysis was an erroneous application of the derivative works right of the statute). *But see* Susan J. Latham, Newton v. Diamond*: Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 125 (2003) (concluding that the plain meaning of the statute is to reject substantial similarity analysis).

192. *See, e.g.*, DEMERS, *supra* note 45, at 96 ("This verdict mistakenly assumes that the compulsory license for song covers exerts any influence on licensing fees for master recordings.").

193. *See* Newton v. Diamond, 349 F.3d 591, 598 (9th Cir. 2003) (sustaining a summary judgment for the Beastie Boys on the basis that their use of Newton's composition "was de minimis and therefore not actionable").

194. *Id.*

entitled "Choir."[195] The Beastie Boys sampled six seconds of "Choir" in their song "Pass the Mic."[196] The Beastie Boys obtained a license for the sample from the owner of the recording copyright, but did not ask permission from Newton, who owned the composition copyright.[197] When Newton filed suit, the district court granted summary judgment for the Beastie Boys.[198] On appeal, the Court of Appeals for the Ninth Circuit, assuming for the sake of argument that the sampled parts of "Choir" qualified for copyright protection, applied the substantial similarity test.[199] It then noted that the practice of sampling, by its nature, will result in situations where the original work and the new work are significantly similar.[200] Therefore, the court concluded, the substantial similarity analysis should be directed toward "the degree and the substantiality of the works' similarity."[201] Applying this fragmented literal similarity analysis, the court affirmed the summary judgment, concluding that the "Beastie Boys' use of a brief segment of [the] composition, consisting of three notes separated by a half-step over a background C note, is not sufficient to sustain a claim for copyright infringement."[202]

The Supreme Court addressed the fair use of pre-existing compositions in *Campbell v. Acuff-Rose Music, Inc.*,[203] concluding that the commercial nature of a song does not make its use of another song presumptively unfair.[204] In *Campbell*, the Court considered whether a parody of a copyrighted composition could be fair use.[205] The hip-hop group 2 Live Crew recorded a parody of Roy Orbison's "Oh, Pretty Woman" entitled "Pretty Woman" that did not sample the original recording but was an identical copy of the original composition with new words.[206] Although they sought permission from Acuff-Rose, the composition owner, to release

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195. *Id.* at 592.

196. *Id.* at 593.

197. *Id.*

198. Newton v. Diamond, 204 F. Supp. 2d 1244, 1260 (C.D. Cal. 2002).

199. Newton v. Diamond, 349 F.3d 591, 594 (9th Cir. 2003).

200. *Id.* at 596.

201. *Id.*

202. *Id.* at 598.

203. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 594 (1994) ("It was error for the Court of Appeals to conclude that the commercial nature of 2 Live Crew's parody of 'Oh, Pretty Woman' rendered it presumptively unfair.").

204. *Id.*

205. *Id.* at 574.

206. *Id.* at 572–73.

the parody, their request was denied and they decided to release the song anyway.[207] Later, after the record had become commercially successful, Acuff-Rose filed a copyright-infringement suit.[208] The district court found that 2 Live Crew's use of the Orbison original was fair as it was a parody intended to show the "banality" of the original.[209] The Court of Appeals for the Sixth Circuit reversed and remanded, pointing to the commercial nature of 2 Live Crew's use as indicative of unfair use.[210] The Supreme Court, in an opinion by Justice Souter, disagreed with the Sixth Circuit, calling it error "to conclude that the commercial nature of 2 Live Crew's parody . . . rendered it presumptively unfair."[211] The Court, noting that no bright line rules could be drawn, engaged in the type of case-by-case analysis required by the fair use statute.[212] Justice Souter concluded that "[n]o . . . evidentiary presumption is available to address either the first factor, the character and purpose of the use, or the fourth, market harm, in determining whether a transformative use, such as parody, is a fair one," and remanded for a consideration of fair use.[213]

Newton and *Campbell* are strongly supportive of the infringement defenses, but both were limited by their facts to the composition copyright and did not address recording copyrights at all.[214] *Campbell* is particularly narrow precedent, as it addresses only the commercial nature prong of fair use and only in the context of parody.[215] The Court did not consider sampling, only the parody reproduction of a composition.[216] And it did not actually call the parody fair; instead it remanded, and the case eventually settled out of court.[217] Of these major cases, only *Grand Upright* and

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207. *Id.*

208. *Id.* at 573.

209. Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1154–58 (M.D. Tenn. 1991).

210. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1439 (6th Cir. 1992).

211. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 594 (1994).

212. *Id.* at 577–94.

213. *Id.* at 594.

214. *See supra* notes 193–204 and accompanying text (explaining the limited facts of each case); *see also* NIMMER, *supra* note 20, § 13.05[C][2] (calling the narrow holding of *Campbell* limited to that case's facts and intended to allow fact-specific analysis by lower courts in parody cases).

215. *See* NIMMER, *supra* note 20, § 13.05[C][2] (concluding that the Court's opinion was "narrowly tailored" and that "it is probably safe to conclude that no sweeping victories can be claimed").

216. *Campbell*, 510 U.S. at 572–73.

217. DEMERS, *supra* note 45, at 120.

Bridgeport actually address sampling as it implicates the recording copyright,[218] and both took a strong stand against sampling.[219] Furthermore, each of these cases considered only traditional, hip-hop sampling, not remix.[220] Artists therefore could hope that courts will look more favorably upon remix sampling than hip-hop sampling, but it is plain that case law provides no clear answer for hip-hop, let alone remix.

More generally, the principle of transformativeness and the heavily-emphasized "purpose and character of the use"[221] fair use factor seem as if they should help remix artists.[222] But a claim to transformative use is only worth whatever weight a court gives it, and the idea of transformativeness has sometimes been severely restricted in the context of literal copying of sound recordings.[223] For remix artists, the third fair use factor—"the amount and substantiality of the portion used in relation to the copyrighted work as a whole"[224]—also seems helpful.[225] Artists like Girl Talk take little enough and use it in insubstantial enough ways that they may qualify for fair use under the third factor, despite their literal copying.[226] However, several courts and scholars have concluded that this type of use is per se not fair.[227]

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218. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 796–98 (6th Cir. 2005); Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

219. *See Bridgeport*, 410 F.3d at 801 (adopting a "get a license or do not sample" standard); *Grand Upright*, 780 F. Supp. at 185 (granting an injunction against Biz Markie and referring the case to the United States Attorney for the Southern District of New York "for consideration of prosecution of these defendants").

220. *See supra* notes 170–204 (discussing the major sampling cases, each of which involved hip-hop music rather than collage-style remix).

221. 17 U.S.C. § 107 (2006).

222. *Cf.* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) ("[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.").

223. *See, e.g.*, *Bridgeport Music*, 410 F.3d at 798 (refusing to apply a substantial similarity analysis to determine transformativeness, because sampling makes a literal copy that can be seen as completely similar).

224. 17 U.S.C. § 107.

225. *See* Ashtar, *supra* note 62, at 297 (arguing that the third factor "favors samplers quantitatively, as the amount taken 'in relation to the copyrighted work as a whole' is small, and qualitatively where the portion does not go to the 'heart of the original work'").

226. *See* Levine, *supra* note 55, at E1 ("Because his samples are short, and his music sounds so little like the songs he takes from that it is unlikely to affect their sales, Mr. Gillis contends he should be covered under fair use.").

227. *See, e.g.*, Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 798 (6th Cir. 2005) (providing the most recent precedent on sampling and strictly forbidding the practice

With the other prongs of fair use analysis relatively uncertain or of little impact,[228] the turning point may be the commercial nature and impact of remix. An economic fair use analysis is important because the four factors consider both "whether such use is of a commercial nature"[229] and "the effect of the use upon the potential market for or value of the copyrighted work."[230] In this light, noncommercial remixers would seem to have a better claim to fair use than profit-deriving remixers.[231] These are essentially amateur musicians, and their use is not for a commercial purpose.[232] Because amateurs have a stronger claim to the noncommercial nature of their work, they are also less likely to harm the market value of the original work.[233] However, under some interpretations of fair use, even nonprofit-oriented remix would be unfair because it is seen as a derivative use and it thus infringes on the copyright owner's exclusive right to make derivative works.[234] Those who profit from the commercial nature of their remix may have an even harder time passing fair use analysis.[235] While the Supreme Court ruled in *Campbell* that the commercial nature of a new work did not make its use of an old work presumptively unfair, this was very narrow precedent, and no actual determination of fair use was made after

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without a license); KOHN & KOHN, *supra* note 36, at 1488 ("[T]he unauthorized use of the typical digital sample made for the purpose of giving the sampling artist's work a familiar element from another artist's distinctive sound would clearly not be considered a fair use . . . .").

228. Factor number two is generally found to weigh against fair use claims in sampling. *See, e.g.*, KOHN & KOHN, *supra* note 36, at 1489 (arguing that the second factor looks at whether the sampled material is informational or creative, and that, because sampled songs are creative works, the second factor is more likely to protect them from fair use claims).

229. 17 U.S.C. § 107 (2006).

230. *Id.*

231. *See* Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1884 (2009) (concluding that "much [freely distributed] fan fiction and remix is fair use").

232. *See id.* at 1887–91 (discussing a somewhat-well-established social norm under which many remix creations are not sold commercially and copyright "owners will not prosecute remix creators who use their works but who do not seek to commercialize them").

233. *See id.* at 1883 (noting that copyright owners' normal strategy of arguing that copying harms artists and record companies fails in the context of remix "because it is implausible in most instances to argue that anyone is harmed" by the remix's existence).

234. *See* KOHN & KOHN, *supra* note 36, at 1489 (arguing that because "sampling would adversely affect the potential market for similar derivative uses of the song or recording, the fourth factor would not support a finding of fair use").

235. *Cf.* Henslee, *supra* note 131, at 700–01 (adopting the position that fair use should never apply to commercial uses, only to non-profit uses).

remand.[236] Therefore, the Court's *Campbell* ruling is not extremely helpful to commercial remix artists.

Some have also argued that these new remix works could not possibly harm the market for the original recordings and may even help that market.[237] This argument for musical synergies may be correct, pushing factor four—the effect of the use on the market for the original work—in favor of the remixers.[238] But this does not make the remix any less commercial, so factor one—the commercial nature of the use—still favors the copyright owners.[239] Given the weight attributed to the commercial factors of fair use, profit-generating remix seems almost de facto unqualified for fair use protection.[240] Gillis, for instance, will have a much harder time relying on fair use than he or his supporters seem to realize, simply because of his "pay what you want"[241] release of *Feed the Animals*.[242]

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236. *See* DEMERS, *supra* note 45, at 120 ("[A] for-profit song could potentially qualify [for fair use] . . . . Yet even the 'Pretty Woman' case eventually settled out of court, leaving no recent precedents defining the scope of fair use."); *see also* Levine, *supra* note 55, at E1 (noting Gillis's belief that he is a musician creating a new song, not just a DJ playing and parodying old songs); *cf.* William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 714–19 (1993) (endorsing parody as a fair use category but discussing various factors and narrow circumstances necessary for a finding of parody).

237. *See* Ashtar, *supra* note 62, at 297–98 ("Sampling sparks an interest in commercially passé songs or artists, generating license fees and increased record sales and exposure for copyright holders.").

238. *See id.* (arguing that because "transformative sampling . . . is unlikely to adversely affect the market for the original work, and may actually improve it," the fourth factor can weigh substantially in favor of remix artists).

239. *See* KOHN & KOHN, *supra* note 36, at 1489 (taking the position that where a sampler's recording is commercial, rather than nonprofit, the first factor weighs strongly against a finding of fair use).

240. *See* Ashtar, *supra* note 62, at 296 (arguing that works available through "freely-downloadable Internet avenues" should qualify for fair use, but that commercial works "available on conventional marketed releases . . . clearly weigh against samplers").

241. "Pay what you want" models may, at first, not appear to be the same type of "commercial use" as a traditional sale of music. However, Radiohead's recent experiment with their release of *In Rainbows* suggests that this method may, in some cases, actually be a more profitable way of selling music. *See Radiohead "In Rainbows" Sales Data Unveiled*, CURRENTTV (Oct. 20, 2008), http://current.com/items/89428205_radiohead-in-rainbows-sales-data-unveiled.htm (last visited Mar. 22, 2011) (showing that Radiohead made more money from the online-only, pre-physical-release distribution of their album than they had made on their entire previous album) (on file with the Washington and Lee Law Review).

242. *See* Mongillo, *supra* note 91, at 29 ("[T]he fact that Gillis sells his music commercially does argue against finding a valid fair use purpose . . . .").

Many who have written on the topic of remix have assumed that it is exclusively noncommercial—music that is not intended to make a profit.[243] Yet the success of *Feed the Animals* shows us that this is no longer a safe assumption.[244] Some scholars simply dismiss this concern about profits because "almost all works that seek fair use protection will be of a commercial nature."[245] Accuracy of these statements aside, dismissal of the economic factors is a mistake given the demonstrated importance of these two factors to fair use analysis.[246] The prevalence of commercial uses does not mean that such uses are all fair; it simply means that all of these works will be equally unlikely to be deemed fair use.[247] While there are significant supporters of fair use for various types of remix,[248] ultimately, it may be correct to suggest that, as it currently exists, "[t]he doctrine of fair use of copyright will not justify sampling for most purposes."[249]

Similarly, the de minimis principle may seem helpful at first, yet its application remains uncertain.[250] The best precedent for remix artists in this area involved only a violation of the composition copyright—the recording copyright was not at issue.[251] In the case of literal copying of sound recordings, courts are not as amenable to de minimis claims.[252] The *Bridgeport* ruling may weaken the principle to the point of nonexistence in the remix context if other circuits choose to follow it.[253]

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243. *See e.g.*, Power, *supra* note 59, at 579–80 (listing as a characteristic element of a "mash-up" that "it should be offered for free, either through personal websites, peer-to-peer file sharing applications, or traditional channels of bootleg culture").

244. *See supra* note 90 and accompanying text (discussing the profit-deriving release of *Feed the Animals*).

245. Mongillo, *supra* note 91, at 29.

246. *See supra* note 240 and accompanying text (pointing out that commercially released remix is substantially less qualified for the fair use defense).

247. *Contra* Mongillo, *supra* note 91, at 29 (arguing that commercial sale of Girl Talk's music should not "be a strong impediment [to a finding of fair use] because almost all works that seek fair use protection will be of a commercial nature").

248. *See, e.g.*, Rothenberg, *supra* note 110, at 247 (suggesting that the best solution for sampling is a slightly adapted fair use standard).

249. KOHN & KOHN, *supra* note 36, at 1488.

250. *Cf. id.* at 1489 (arguing that the third factor of fair use applies only to de minimis samples, making a de minimis inquiry a sampler's best hope).

251. *See supra* notes 193–94 and accompanying text (discussing the *Newton* case).

252. *See, e.g.*, *supra* notes 178–90 and accompanying text (discussing the Sixth Circuit's refusal to apply de minimis principles to sampling-based music).

253. *See* Joshua Crum, Comment, *The Day the (Digital) Music Died:* Bridgeport*, Sampling Infringement, and a Proposed Middle Ground*, 2008 B.Y.U. L. REV. 943, 960–64 (2008) (arguing that without a compulsory licensing scheme, the *Bridgeport* rule reduces the defenses to copyright infringement to practical nullities).

Furthermore, in the context of both defenses, an important circuit split has emerged regarding how to determine whether the similarity in question is substantial.[254] Is similarity to be determined by asking whether an average audience recognizes the original work in the new work?[255] Or, should a musical expert be the one to make this determination?[256] There are good arguments and several circuits on each side of this debate.[257] This split is simply further evidence of how unworkable and uncertain the current system is, especially for remix, which is often artistically complex and may depend on a certain type of audience.[258]

Clearly, these defenses are very complex, and remix provides a close case with strong arguments for and against their application. The point is not that the existing defenses will never apply to remix. In some fact-specific instances in front of favorable courts, they might. Rather, the idea is that the application is too uncertain, relying too much on subtle distinctions in musical use and differences in the artistic opinions of judges.[259] Even the types of modified fair use regimes proposed by some scholars, while perhaps sufficient for amateur remixers, are too unreliable for commercial remix artists.[260] Uncertainty about the defenses will have a chilling effect and lead to less creativity, less music produced, and less profit for artists and copyright owners.[261]

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254. *See* KOHN & KOHN, *supra* note 36, at 1490–91 (discussing different standards for determining similarity and the unsettling effect of these differences on samplers).

255. *See* NIMMER, *supra* note 20, § 13.03[E] (discussing the "audience test" for similarity).

256. *See id.* § 13.03[E][4] (discussing the allowance, in some circumstances, of an expert opinion).

257. *See* Alan Korn, *Issues Facing Legal Practitioners in Measuring Substantiality of Contemporary Musical Expression*, 6 J. MARSHALL REV. INTELL. PROP. L. 489, 494–97 (2007) (noting that a majority of circuits have adopted the average audience approach, but that this standard is not universally followed because of some difficulties it raises).

258. *See id.* at 496 ("[D]ifficulties may arise when an ordinary lay audience is confronted with unfamiliar genres beyond the musical mainstream. . . . [O]rdinary lay persons may be unable to understand and appreciate certain complex and technical works.").

259. *See infra* notes 276–81 and accompanying text (discussing the uncertainty of the defenses).

260. *See* Ashtar, *supra* note 62, at 316–18 (proposing a modified fair use and de minimis regime); Rothenberg, *supra* note 110, at 247 (proposing a slightly altered fair use and substantial similarity analysis).

261. *See* Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831, 854–55 (2010) ("[A] potential user of a work may have great difficulty predicting whether her unauthorized use will be permitted. Once again, the prudent and risk-averse user will desist from that use . . . .").

B. Licensing

While few remix artists wish to take a risk on the infringement defenses, they still have the option of obtaining a license. The mere fact that there is no compulsory process for licensing of recordings does not mean that musicians cannot negotiate for a license.[262] But the prospect of license negotiations with a recording owner is as unattractive as relying on the defenses.[263] Because licenses for sound recordings are not compelled by statute, their acquisition often depends entirely on the whim of the copyright owner.[264] A few recording artists, such as Jay-Z, have encouraged and facilitated remixing, but these artists and record labels are by far the minority.[265] Furthermore, without a statutory royalty system, the rates demanded by copyright owners are often exorbitant—far beyond what most remix artists can afford, especially before they even know if their work will be commercially successful.[266] To make matters even more difficult, remix requires licenses for both the sampled recording and the underlying musical composition, and these licenses usually must be obtained from separate owners.[267] Obtaining all the necessary permissions quickly becomes a scavenger hunt of such gigantic proportion and expense that makes it easier never to create remix music in the first place.[268]

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262. *See* KOHN & KOHN, *supra* note 36, at 1495 (arguing that despite the absence of a compulsory license, copyright owners can and should still grant negotiated licenses).

263. *See* Ashtar, *supra* note 62, at 271 ("[N]othing in the law compels copyright holders to grant licenses to prospective samplers or users of composition rights (for any quotation other than straightforward covering) . . . . As a result, bargaining for licenses is done on a case-by-case basis and conditions make the use of numerous samples prohibitive.").

264. *See id.* at 273 (noting that conditions and fees vary but that "some rights holders refuse to license outright").

265. *See* Shaheem Reid & Joseph Patel, *Remixers Turn Jay-Z's Black Album Grey, White and Brown*, MTV (Jan. 26, 2004), http://www.mtv.com/news/articles/1484608/20040126/jay_z.jhtml?headlines=true (last visited Mar. 22, 2011) (describing Jay-Z's desire to release an a cappella version of his album so people could "remix the hell out of it" and noting that this was a departure from normal practice, even for Jay-Z) (on file with the Washington and Lee Law Review).

266. *See* Ashtar, *supra* note 62, at 273 ("Flat fees are generally made available, with prices set between one and five thousand dollars"); Josh Norek, Comment, *"You Can't Sing without the Bling": The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83, 90–91 (2004) (arguing that the high cost of licensing samples prevents new music from being developed and unfairly favors established, wealthy artists).

267. *See* KOHN & KOHN, *supra* note 36, at 1491 (discussing the need to get clearance from both copyright owners and noting that "[t]hese are rarely the same entities").

268. *See* Ashtar, *supra* note 62, at 274–75 ("The regime disincentivizes the use of assorted samples, as every sample sought involves increased costs, time, frustration, and

C. Obtain a License or Rely on the Defenses?

The Girl Talk example illustrates the challenge facing remix: Gillis claims fair use because he has no choice but to do so.[269] Obtaining licenses for every sample he uses would likely be prohibitively expensive for a part-time musician and part-time engineer whose only instrument is a laptop.[270] Even if he could afford samples, owners might be unwilling to grant them if, for example, they consider his music to be a derogatory critique of theirs.[271] Because he samples rather than covers songs, there is no compulsory license available to him for recordings, leaving his creativity at the mercy of copyright owners, who get to decide which licenses to award him.[272] Gillis recognizes the limitation licensing would place on his creativity, saying "[i]t's already very difficult for me to put together 40 minutes of music, and if you say, 'Okay, you don't have the whole world of music to sample from; you only have these few hundred songs,' it would be really frustrating."[273] He continues with an analogy to more traditional, rock music: "That's like asking Metallica to write an album but not use bass."[274] Because of the changes he makes to his samples, Gillis is also unlikely to be able to obtain compulsory licenses for the compositions underlying the recordings he samples, so he is subject to double copyright

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forfeited rights. Resultantly, would-be sampling artists are less creative in their production.").

269. *Cf.* Tough, *supra* note 1 ("When pressed, [Gillis] will gamely make the fair-use case, but mostly he seems to react to the legal argument against sampling the way most people under 30 do: you gotta be kidding me.").

270. *See* Norek, *supra* note 266, at 90–91 (discussing the expense of licensing samples and the prejudice of the system toward wealthy musicians with prior success); *see also Quit Your Day Job: Girl Talk*, STEREOGUM (Feb. 7, 2007), http://stereogum.com/archives/quit-your-day-job/quit-your-day-job-girl-talk_004530.html (last visited Mar. 22, 2011) (interviewing Gillis on the subject of his dual life as a working biomedical engineer and musician) (on file with the Washington and Lee Law Review). Only in recent years has Gillis become successful enough to quit his day job; he now dedicates all of his time to music. Tough, *supra* note 1.

271. *See infra* note 348 and accompanying text (discussing the possibility that musicians may object to uses of their music that they do not like and try to prevent them).

272. *See supra* notes 46–47 and accompanying text (noting the absence of a compulsory license from the recording copyright and the control that this gives copyright owners).

273. Matthew Newton, *The Inquisition: Girl Talk*, SPIN (Sept. 22, 2008), http://www.spin.com/articles/inquisition-girl-talk (last visited Mar. 22, 2011) (on file with the Washington and Lee Law Review).

274. *Id.*

infringement.[275] He must rely on fair use, but he may also have to bear the cost of litigation in order to find out if that defense will work.[276] This is the conundrum of all remix artists: They have a slim chance of obtaining every license they would need to create their work so they must rely on infringement defenses, yet those who attempt to release their music through commercial channels significantly weaken those defenses.[277]

Also troubling for remix artists is the fact that they cannot know whether their use will be deemed fair or not until long after they have made themselves liable for copyright infringement.[278] Even if they are sufficiently protected by fair use and the de minimis doctrine as some have suggested,[279] they are gambling thousands of dollars of liability in an area where no court has given them substantial support.[280] The fair use and de minimis theory of remix thus remains largely untested and unsatisfactory because of "the lack of precedent . . . out-of-court settlements . . . and the fact that defendants are unable to afford protracted litigation."[281]

Remix artists therefore face two separate catch-22 situations: they cannot release their music without a license, cannot obtain a license without paying for it up front, and yet, for the most part, cannot pay for licenses without releasing their music to make a profit.[282] On the other hand, remixers cannot release their music without claiming fair use, however they

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275. *See* KOHN & KOHN, *supra* note 36, at 697 (explaining that a compulsory license for a composition is likely not available to a musician seeking to sample that composition in a way that would transform the song in any way); *id.* at 1482 (explaining that unauthorized sampling can be an infringement of both the recording copyright and the composition copyright).

276. *See* Ashtar, *supra* note 62, at 269 ("Under the current regime, the burden of proof rests on samplers such that mounting defenses, even when charges are baseless, can be debilitatingly expensive.").

277. *See supra* notes 235–47 (explaining the effect of commercial distribution on fair use).

278. *See* DEMERS, *supra* note 45, at 121 ("[T]here is virtually no chance that the costs associated with mounting successful defenses will decrease anytime soon. . . . For the majority of musicians who appropriate, fair use is dead."); *see also supra* notes 193–94 and accompanying text (discussing the most sampling-friendly case, *Newton v. Diamond*, which does not extend to violations of the recording copyright).

279. *See, e.g.*, Mongillo, *supra* note 91, at 31–32 (concluding that Girl Talk's music is protected by fair use and provides an example of the importance of the defense's ad hoc nature).

280. *Cf.* NIMMER, *supra* note 20, § 13.05[C][2] ("[T]he vehicle that the Court chose for remand [in *Campbell*] threatens to choke future vindications of the fair use defense.").

281. Ashtar, *supra* note 62, at 298–99.

282. *See id.* at 266 (describing a catch-22 "created by licensors' demand that prospective samplers submit their work before granting their consent").

cannot claim fair use until a lawsuit is filed, which usually requires their music to be released.[283] Remix musicians have only illusory choices; contradictory laws have placed them in a lose-lose situation.

V. The Solution: Compulsory Licensing for Sound Recordings

Why should the law operate this way? If a traditional musician decides to cover an existing work, a license is available.[284] Remix artists could have the same access if they too had a compulsory license at their disposal. This Part argues for such a compulsory license, pointing out why it is justified, why Congress might be amenable to such a change to copyright, and how such a license should work. It also addresses several perceived problems with this proposal, concluding that, despite these problems, it is the best solution for all interested parties.

A. Justifications for a Compulsory License

There are several justifications for compulsory licensing for recordings. These include: Congress's prior recognition of the benefits of such a system for recordings, Congress's passage of compulsory licenses in similar situations, scholars' recognition of the benefits of recording compulsory licenses for sampling, and various practical advantages including benefits to remixers, copyright owners, and sampled musicians. This Part addresses each in turn.

When Congress first created the recording copyright in 1971, it considered including a compulsory licensing procedure for recordings similar to the one for compositions.[285] While the benefits of such a system were substantial, the bill's drafters determined that the license would be too difficult to administer.[286] They were also concerned that such a license would give licensees a shortcut that would allow them to forgo costs such as hiring musicians and paying for recording studio time.[287] Over time, however, such a system has become much easier to administer and even

283. *See supra* notes 276–81 and accompanying text (discussing the uncertainty of fair use).

284. *See supra* notes 110–13 and accompanying text (discussing compulsory licenses for covers).

285. H.R. REP. NO. 92-487, at 4 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1569–70.

286. *Id.*

287. *Id.*

more necessary because of remix.[288] Computers and the Internet have made possible the licensing that Congress once considered a potentially correct but impossibly difficult result.[289] Furthermore, the concern that such a compulsory license would be too much of an artistic shortcut is mitigated by the necessity of using recordings in the context of remix.[290] Technology and creativity now give a good reason for compulsory licensing of the audio recording itself: It is the medium of a whole new generation of musicians.[291]

The necessity of compulsory licenses has been recognized by Congress on several occasions: The 1976 copyright act contained a compulsory license that allowed cable television companies to rebroadcast content originally aired on a broadcast network.[292] Congress thereby protected existing copyright owners from the new technology of cable by establishing copyright liability for cable networks that copied or altered broadcast content.[293] But it tempered this copyright protection with a way for cable networks to compel authorization of their use if necessary.[294] In 2002, Congress again extended compulsory licensing, this time to small and noncommercial "webcasters."[295] The act simplified the process for licensing online broadcasts of music by authorizing a receiving agent of the Librarian of Congress to set rates and terms for small webcasters on behalf of all copyright owners.[296] With this act, Congress not only recognized the legitimate need of small webcasters for compulsory licenses, but also acknowledged that in some unique circumstances, changes could be made

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288. *See* Ashtar, *supra* note 62, at 314 (noting that "Congress's original intentions in enacting the compulsory regime for covers [are] remarkably applicable to today's sampling").

289. *Cf.* Jim Dalrymple, *Getting Your Music on the iTunes Store* (Mar. 15, 2007), http://www.macworld.com/article/56813/2007/03/tunecore.html (last visited Mar. 22, 2011) (discussing the simplification of the infrastructure of musical distribution through online music sales) (on file with the Washington and Lee Law Review).

290. *See* Rothenberg, *supra* note 110, at 241 ("[W]ith the advent of technology the fundamental nature of musical borrowing has undergone an important change.").

291. *Cf.* Ashtar, *supra* note 62, at 268 ("While technology for musical creation and access has improved dramatically, the law has failed to evolve, and samplers wearily navigate its terrain.").

292. 17 U.S.C. § 111 (2006).

293. *See id.* (establishing copyright liability for the broadcasts of television networks).

294. *See id.* (granting cable networks a compulsory license to obtain crucial network content).

295. *See generally* Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (2002).

296. 4 WEST'S FED. ADMIN. PRAC. § 4016.1 (3d ed. 2010).

to copyright for those who were economically unable to operate under the existing system.[297] This Congressionally sanctioned settlement between copyright owners and webcasters with a "belief in their inability to pay the fees due"[298] is particularly relevant to remix, because of the similar inability of most remix artists to pay for their uses.[299] Thus, compulsory licenses are not unprecedented; they have been extended to several entities in the past in circumstances similar to those of remix.

Several scholars have already proposed compulsory licenses for hip-hop sampling.[300] While these arguments are compelling, compulsory licensing is perhaps even more justified in the context of remix, in part because it is more transformative than hip-hop.[301] Furthermore, compulsory licensing might not actually be a substantial, new burden on the recording copyright, because sound recordings already enjoy a more limited scope of protection than compositions and other works of authorship. For instance, recordings do not enjoy the same exclusive performance right that musical compositions do.[302] They are also already subject to a compulsory license for noninteractive digital transmissions.[303] An additional limitation on the recording copyright, scholars say, would be in line with the long tradition of balancing copyright with new innovations.[304]

Finally, a compulsory licensing regime has several practical advantages. It would make the law easier to apply and prevent it from exerting an influence on musical creativity.[305] It could also clarify the line

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297. Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, § 2, 116 Stat. 2780, 2780 (finding that in these "extraordinary and unique" circumstances, Congress should "reach an accommodation with the small webcasters on an expedited basis").

298. *Id.*

299. *See supra* Part IV.B (discussing the high cost of licensing samples used).

300. *See, e.g.*, WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 199–258 (2004) (proposing an alternative system of compensation for music generally, including a licensing component for major sampling); Baroni, *supra* note 65, at 94 (outlining a compulsory licensing scheme for hip-hop sampling).

301. *See supra* notes 61–64 and accompanying text (distinguishing between derivative hip-hop music and more transformative remix).

302. *Compare* 17 U.S.C. § 106(4) (2006) (granting an exclusive right to public performance for musical compositions), *with* 17 U.S.C. § 114(a) (specifically stating that sound recordings do not receive the same performance right).

303. *See supra* notes 295–99 and accompanying text (discussing the webcasting license).

304. *Cf.* LESSIG, FREE CULTURE, *supra* note 43, at 194 (arguing that copyright has long been kept in balance with new technology).

305. *Cf. supra* notes 76–79 and accompanying text (noting the difficulty of applying

between commercial and noncommercial remix—in much the same way that only musicians releasing a commercial recording of a cover song need a compulsory composition license, only commercial remix artists would need a compulsory recording license.[306] Perhaps most importantly, a compulsory license is a good policy solution that considers the interests of all parties concerned.[307] It allows remixers to create their art and gives them the incentive of profit.[308] It also provides recording copyright owners a chance to make profits by licensing dormant back-catalogues, while avoiding the risk of setting bad precedent by litigating under the current law.[309] Finally, it will often give the original composers and performers of songs increased exposure to new audiences and increased royalty payments.[310] This benefit might only flow to those whose songs are sampled in a recognizable way, but the gain for these artists could be substantial.[311] As remix grows more common, only compulsory licensing will allow every party involved to reap the profits that are currently left unrealized.[312]

B. How Should a Compulsory License Operate?

To be effective, any new regime should have several elements.[313] The regime should allow compulsory licensing for commercial remix in a way

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existing copyright law to remix).

306. *See* LESSIG, REMIX, *supra* note 66, at 254 (noting that copyright law already distinguishes between amateur and commercial use in several other contexts and arguing that the same exemption of amateur, noncommercial use should apply to remix as well).

307. *See supra* note 124 and accompanying text (discussing, in the context of the composition compulsory license, the benefits to the parties involved).

308. *Cf.* Ashtar, *supra* note 62, at 292–98 (arguing that new creation should be encouraged and that "consumers are interested in variations (as is the case with covers)").

309. *Cf. supra* note 237 and accompanying text (discussing the argument that remix may significantly benefit the market for the sampled works); *supra* note 95 and accompanying text (discussing a fear among copyright owners of litigating against some remix artists due to the risks of losing or creating bad precedent).

310. *See* Ashtar, *supra* note 62, at 314 (noting that compulsory licensing would provide exposure to the sampling artist and the sampled artist and would provide "fair rewarding of copyright holders").

311. *Cf. id.* at 298 ("[T]he sampling work will, if anything, increase the sampled work's market through cross-pollination.").

312. Shachtman, *supra* note 10 ("With all that hype, 'Why not just sign the guy?' asks the Creative Commons' Brown. 'Why not license the record, and have everybody make a bunch off of it?'").

313. While a detailed proposal for a regime is beyond the scope of this Note and

that substantially mirrors the § 115 license.[314] That section requires that a licensee provide notice of her intention to obtain a compulsory license and then pay either the statutorily provided, monthly royalty or a lower, privately negotiated royalty.[315] A recording compulsory license could operate the same way. To properly distinguish between this licensed, commercial remix and merely amateur, experimental remix, the statute should also explicitly provide that noncommercial remix is allowed by the fair use doctrine and requires no compulsory license until it is commercialized.[316] "Commercial" remix would then mean any remix released with the intention of making a profit, regardless of whether or not the remix is actually successful enough to make money.

Prohibitively expensive, up-front-payment licenses currently prevent remix from being released effectively.[317] Compulsory licensing must, therefore, be reasonably priced and royalty based.[318] A new licensing regime should prohibit or strongly discourage large advances on royalties in order to allow a pure royalty system of monthly compensation for the use of samples.[319] Such a system would be similar to the one small webcasters successfully petitioned Congress for in that it would be based on a percentage of revenue rather than an arbitrary, flat fee.[320] The amount of

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perhaps even beyond what Congress could put in a bill, some general observations about how the license should operate are possible. Much as courts have discretion in applying the fair use doctrine, Congress likely should delegate some amount of discretion to administrative agencies to determine how best to execute the details of this licensing scheme.

314. *Cf.* Baroni, *supra* note 65, at 94 (proposing a compulsory licensing scheme for hip-hop sampling similar to the § 115 composition compulsory license, which prevents covers from being copyright infringements).

315. 17 U.S.C. § 115(b) (2006).

316. *Cf.* Ashtar, *supra* note 62, at 317–18 (proposing a modified fair use and de minimis regime that would allow sufficiently transformative uses of sampling). This proposal seems like a good idea for amateurs, but there is no reason why commercial remixers, who profit by using other peoples' recordings, should not provide some compensation to copyright owners somewhat. *Cf.* Baroni, *supra* note 65, at 96 (proposing a compulsory license and saying that samplers ought to have to pay royalties, as they will "benefit enough by a compulsory license legalizing sampling").

317. *See supra* notes 266–68 and accompanying text (discussing the common requirement of large advances which make remix prohibitively expensive to make legally).

318. *Cf.* KOHN & KOHN, *supra* note 36, at 1500–01 (comparing the various licenses a sampled copyright owner can grant, including one-time flat fees before the sample is used and percentage-based fees that are paid after the sample is used).

319. *See* Baroni, *supra* note 65, at 96 (proposing monthly compulsory license payments).

320. *See* Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, § 2, 116 Stat. 2780, 2780 (indicating Congress's desire for a webcasting fee "based on a percentage of

each royalty should be based on several factors, including the amount of the recording taken, the amount of the composition taken,[321] and the degree to which the existing song is used in the new song.[322] Perhaps back-catalogue recordings that are beyond their initial, commercially useful period should cost less to license than recordings that are currently popular chart-toppers.[323] These determinations of the exact method of pricing are best left flexible and within the discretion of administrative agencies.[324] Congress need only direct that remix be able to pay for its own royalty costs entirely by its commercial release, regardless of the number of samples used.[325]

Finally, the compulsory license should only apply to copying that is truly transformative, not merely derivative.[326] This will allow for remixes, but prevent the wholesale copying of music, thus protecting recording copyright owners' legitimate anti-piracy interests.[327] How best to handle derivative hip-hop sampling is up for debate; conceivably it too should fall under the compulsory license, but more likely, it should remain permission-based.[328] Again, this is best left to an executive body such as Copyright Royalty Judges.[329] The problem is not that the existing

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revenue").

321. A drawback to this licensing scheme is that it will incidentally affect the composition copyright as well. *See infra* notes 345–46 and accompanying text (discussing the effect of this proposal on the composition copyright).

322. *See* Baroni, *supra* note 65, at 96–99 (discussing several factors that could weigh on the fee charged for a sample, but concluding that these "are just suggestions, however, and the determination of a rate is best left to [an administrative body]").

323. *See* LESSIG, FREE CULTURE, *supra* note 43, at 112–13 (arguing that all culture, including music, goes through a "commercial life," in which it is sold for profit, and a later, post-commercial life, in which it still has value, even if it is no longer making money from its initial release).

324. *See* NIMMER, *supra* note 20, § 7.27 (discussing the various bodies to which Congress has delegated the administration of copyright royalties).

325. *See* Ashtar, *supra* note 62, at 271 (arguing that the current system makes it financially impossible to obtain licenses for sample-based works, especially ones that use more than one or two samples).

326. *Cf.* Rothenberg, *supra* note 110, at 251–53 (proposing that transformative use "be incorporated as a fifth factor in the fair use test" as a means of encouraging the creation of new, transformative works).

327. *See* LESSIG, REMIX, *supra* note 66, at 110–14 (arguing for changes to the law that would allow remix but would keep piracy illegal).

328. *Compare* Baroni, *supra* note 65, at 94–96 (proposing granting broad license to sample in any manner), *with* Ashtar, *supra* note 62, at 317 (limiting the proposed permission to sufficiently transformative sampling and stating that insufficiently transformative uses will have to pass through "the current regime of negotiating with rights holders").

329. *See* NIMMER, *supra* note 20, § 7.27 (discussing entities to which Congress has delegated copyright administration, including Copyright Royalty Judges).

transformative/derivative standard is wrong; the problem is that courts do not apply it predictably. Therefore, compulsory licensing should be made available and should be administered by specialists. Artistic determinations of transformativeness must be placed in more capable hands than those "trained only to the law."[330]

C. Perceived Shortcomings of Compulsory Licensing

The proposed compulsory license does have a few shortcomings that should be recognized. First, there is the accusation that a compulsory license would be too much of a bright line rule. Second, there is a minor concern, as in almost any music copyright discussion, that this system will contribute to Internet piracy. Third, compulsory recording licensing could require reform of the entire copyright system including the composition compulsory license. Finally, there is some concern among artists for the artistic integrity of their music. Each of these critiques is addressed in turn.

First, it will be difficult to draw a line as to what does and does not qualify for the compulsory license, and it is possible that no hard lines can be drawn in this area. Indeed, basing the compulsory license on a determination of transformativeness would be as vague and difficult as the current fair use regime.[331] Uncertainty will always exist in these rules, which is why some scholars have suggested abolishing fair use for music entirely, thereby achieving clarity.[332] Perhaps the compulsory license critics, who nonetheless support remix music and reject a statutory solution as an undesirable bright line rule, are correct to say that such rigid rules should be avoided.[333] These critics usually suggest that Congressional action would, by nature, be a bright line rule and that the flexible, ad hoc doctrines currently in place in the courts are more attractive.[334] A case-by-case determination is, in fact, desirable, given the large amount of variation in remix.[335] However, this does not mean that Congress should not pass a

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

331. *See* Rothenberg, *supra* note 110, at 247 (suggesting that defining transformativeness will be an issue in any solution to the sampling problem).

332. *See generally* Henslee, *supra* note 131 (advocating abolishing fair use as applied to music).

333. *See, e.g.*, Rothenberg, *supra* note 110, at 247 (rejecting compulsory licensing as the type of bright line rule that is contrary to the purpose of copyright).

334. *See* Patry & Perlmutter, *supra* note 236, at 719 (concluding that a "flexible doctrine, responsive to the facts of each individual case" is the best option for copyright).

335. *See supra* notes 76–79 and accompanying text (noting the variety of styles within

compulsory license; rather, a balance of consistency and flexibility can be struck. The courts have sometimes proven unwilling to engage in ad hoc analysis, searching instead for bright line rules despite their statutory mandate to make a fact-specific determination.[336] Therefore, Congress should remove the courts entirely in order to provide some amount of standardization in place of the utter lack of clarity that plagues remix under the current system of affirmative defenses.[337] A system that keeps judges from making artistic determinations, keeps musicians from having to pay litigations costs, and allows for profits for everyone involved would surely be superior to the ad-hoc-but-restrictive system currently in place.[338] Congress could retain substantial flexibility by, for example, establishing an application process like the one currently in place for patents, thereby placing discretion in the hands of experts, rather than by providing a rigid statutory test for compulsory license qualification.[339] Regardless of how Congress chooses to determine transformativeness for each license, it is better to let the legislature and its designated agencies make this decision than the courts.

Second, this proposal does not solve the problem, ever present in the discussion of musical copyrights in the post-*Napster* era, of piracy. Remixers who want to release their work should encourage its dissemination through legal channels, an avenue not currently open to them.[340] Perhaps more important is the third criticism: This proposal does, to some extent, require a broader copyright reform effort—it would require the same type of record-keeping for sound recordings that is currently in place for the licensing of compositions.[341] But this does not automatically

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remix and the difficulty of applying legal analysis to ever-changing art and technology).

336. *See, e.g.*, Morrison, *supra* note 61, at 106–09 (arguing that the *Bridgeport* court ruled in clear contradiction of the copyright statute in its effort to establish a rule).

337. *Cf.* Baroni, *supra* note 65, at 93 ("Historically, where new technologies have given rise to substantial controversies, compulsory licenses have resolved those controversies by stemming litigation and setting standards by which to operate.").

338. *See supra* note 106 and accompanying text (discussing the belief that artistic judgments have no place in the law); *see also* Coombe, *supra* note 51, at viii (noting that "however potentially generous, fair use is valuable only to those who can afford the fees necessary for aggressive litigation").

339. *See* Baroni, *supra* note 65, at 97 (suggesting that fees and other determinations be left to administrative agencies specializing in copyright rather than explicitly provided by statute).

340. *See* Levine, *supra* note 55, at E1 (pointing out that both iTunes and a CD distributor had pulled Girl Talk albums from distribution because of legal concerns).

341. *See* LESSIG, FREE CULTURE, *supra* note 43, at 287–90 (discussing the need for expanded, nonburdensome formalities in the copyright system).

mean an inefficient, government-run system; instead, it could be done inexpensively, on the Internet, and through the private sector the same way composition licensing is already done.[342] Such an arrangement may evolve naturally with the compulsory process as a backdrop, much like the existing system for compositions.[343]

Because remix implicates both the composition and recording copyrights, the new regime will also incidentally affect the compulsory license for musical compositions. The composition compulsory license gives the licensee the right only to make limited stylistic changes to a song, while it reserves the right to make changes to the song's fundamental character for the copyright owner.[344] An exception will need to be made to this provision for sampling. Just as covering musicians can make a limited arrangement of a composition, remix artists must be able to make some changes to a composition's character in order to fit it into their new work.[345] This system would provide royalties for both composition owners and recording owners and would allow remix artists to work with recordings without fear of violating the arrangement restrictions of § 115. Certainly this is a better system than the current unequal treatment of compositions and recordings in the sampling context.[346] Admittedly, the new system might incidentally implicate other areas of copyright. But remix music is but one example of the problems posed by outdated copyright laws. Remix culture is broader than just music. To the extent that the proposed compulsory recording license would require change in other areas of copyright, this Note can be considered the latest in a long line of calls for copyright reform generally.

Finally and most compellingly, there may be one legitimate interest that is short-changed by this system: The original composer or performer's interest in the "artistic integrity" of their creation.[347] This is the concern of

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342. *See id.* (discussing the use of the Internet and private registering companies in a system of increased copyright formalities).

343. *Cf.* KOHN & KOHN, *supra* note 36, at 16–18 (discussing the private entities that administer composition licensing against the background of the compulsory process).

344. *See supra* note 111 and accompanying text (explaining that compulsory licensing does not allow the licensee to change the composition more than to make a minor, stylistic adaptation).

345. *Cf.* KOHN & KOHN, *supra* note 36, at 697 (noting that a composition compulsory license is generally not available to a sampler who would alter the sample in any way).

346. *See* Galvin, *supra* note 191, at 538 (arguing that the *Bridgeport* ruling reflects an unjustifiable imbalance between the composition copyright and the recording copyright).

347. *See* KOHN & KOHN, *supra* note 36, at 1495 (arguing that a compulsory license "unreasonably ignores the rights of the creative artist's right not to have his work 'perverted,

the original musician that a remix involving his or her song will spoil or dilute the original song.[348] However, this objection is highly limited.[349] The integrity of a musician's work is already somewhat restricted by the compulsory license requiring them to allow others to cover their compositions.[350] Musicians also already lack control over what is done with their recordings, as most recordings are owned by record companies rather than musicians.[351] Finally, remix is somewhat different from other encroachments on artistic integrity: It is more often a way of referencing or paying tribute to the original than a way of criticizing or devaluing it.[352] In this way, remix is less of an infringement on artistic integrity than traditional, hip-hop sampling, fair use parodies, or even some covers. Instead, it is more like the next step in the long history of reinterpreting other musicians' works.

D. Compelling Evidence for the Compulsory License

Despite these problems, compulsory licensing is the best solution to this issue; any other resolution will not achieve the same combination of positive results. A compulsory license for sound recordings satisfies the creative need for unrestricted access to recordings, creates a legal channel for remix distribution, and makes the dividing line between licensing and fair use one of commercial intent, much like the way cover songs are already treated.[353] This eliminates an artificial and unfair distinction in copyright law between covers and remixes. It also removes artistic

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distorted, or travestied,' a right which Congress has enacted into law"); *see also* David S. Bloch, *"Give the Drummer Some!" On the Need for Enhanced Protection of Drum Beats*, 14 U. MIAMI ENT. & SPORTS L. REV. 187, 210–17 (1997) (arguing for enhanced protection for drummers in the artistic integrity of their contributions to recorded music).

348. *See, e.g.*, KOHN & KOHN, *supra* note 36, at 1490 (discussing the infringement case filed by Gilbert O'Sullivan against Biz Markie and noting that it was not brought by a record company, but by O'Sullivan himself, who was unhappy that his song was being used in an unapproved way).

349. *Cf. id.* at 1495 (arguing that copyright owners should grant licenses unless they have a compelling reason not to).

350. *See supra* note 110–11 and accompanying text (noting that compulsory licenses require composers to allow covers of their music).

351. *See supra* note 45 and accompanying text (pointing out that recordings are usually owned by record companies, not by the musicians with concerns of artistic integrity).

352. *See supra* notes 66–75 and accompanying text (defining and describing remix).

353. *Cf. supra* note 128 and accompanying text (noting the requirement of a compulsory license only for a public cover of a composition).

determinations from courts that seem unwilling to make the case-by-case decisions that transformative works depend on.[354] Finally, it provides a system in which everyone profits from new creations, a decided advantage over proposals for expanding the existing defenses so that remixers benefit, but copyright owners do not.[355]

Recently, Congress has given mixed signals on the direction of musical copyrights. Some testimony indicates that legislators may actually be more inclined to repeal the existing compulsory license for compositions than to institute a new one.[356] On the other hand, both houses of Congress have considered bills that would require radio stations to pay performers a royalty each time they play that performer's rendition of a song.[357] This may indicate that Congress is amenable to systems, like the compulsory license proposed here, that allow the dissemination of music but attempt to fairly compensate all parties involved.[358] Congress should continue to move in this direction and recognize that "the time has come for musical copyright doctrine to thaw."[359]

VI. Conclusion

The sampling controversy is nothing new. First there was hip-hop. Then computers and the Internet brought a wave of somewhat more transformative sampling. Now we have arrived at *Feed the Animals*—creative, transformative uses of copyrighted recordings are becoming increasingly common and profitable. The commercial success of remix artists has reaffirmed the immediacy of this issue. Perhaps now that

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354. *See supra* notes 331–39 and accompanying text (responding to the criticism that a compulsory license would be a bright line rule that would be inferior to ad hoc judicial analysis).

355. *See supra* note 316 (explaining that modifications to existing law would not compensate copyright owners, while a compulsory license would).

356. *See, e.g.*, *Hearing Before the Subcommittee on Courts, the Internet and Intellectual Property of the Comm. on the Judiciary H.R.*, 108th Cong. 13 (2004) (statement of Marybeth Peters, Register of Copyrights) (arguing that the composition compulsory license should "be repealed and that licensing of rights should be left to the marketplace").

357. *See generally* S. 379, 111th Cong. (2009); H.R. 848, 111th Cong. (2009).

358. *See Singer Dionne Warwick Wants Performers Paid for Radio Play*, FOX NEWS (Mar. 2, 2010), http://www.foxnews.com/entertainment/2010/03/02/singer-dionne-warwick-wants-performers-paid-radio-play/ (last visited Mar. 22, 2011) (explaining the argument that performers, like songwriters, should be paid for uses of their work such as radio broadcasts) (on file with the Washington and Lee Law Review).

359. Ashtar, *supra* note 62, at 302.

sampling has been around for several years and there is obvious profit to be made, Congress will finally act.

As this Note was being prepared for publication, two significant events occurred in the same week. First, after years of negotiations, Apple Records and Apple Computer reached an agreement to bring the Beatles catalogue to the iTunes music store.[360] Even the Beatles, "one of the rock world's most famous holdouts," may be warming up to digital uses of their music.[361] Second, Gillis released a new Girl Talk album entitled *All Day*.[362] This time, Gillis did not give downloaders the option of paying; *All Day* is completely free.[363] However, Gillis did simultaneously announce an extensive tour by which he might make a substantial profit.[364] Again, the album was immediately successful, garnering positive reviews,[365] "clogged download page[s],"[366] and reports that Girl Talk's popularity that day "broke the internet."[367] Even though Gillis's use is arguably slightly less commercial on this album, the issues that surrounded *Feed the Animals* remain as relevant as ever. Asked recently if he was concerned about being sued, Gillis responded:

> With each release, I anticipate it: What's it going to be this time? How much bigger is this project gonna get? How many more people are going to hear it? Is anyone gonna be offended by it? I do believe it should be legal, and I do think it should fall under fair-use. But, simultaneously, it's a gray area. You don't know. You may be challenged. Even if it is legal, I don't want to go to court to fight it if I don't have to.

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360. Ian Sherr, *Apple Announces It Will Now Sell The Beatles in ITunes*, WALL ST. J., Nov. 16, 2010.

361. *Id.*

362. *Download the New Girl Talk Album for Free Now*, PITCHFORK (Nov. 15, 2010), http://pitchfork.com/news/40704-download-the-new-girl-talk-album-for-free-now/ (last visited Mar. 22, 2011) (on file with the Washington and Lee Law Review).

363. *Id.*

364. *Id.*

365. *E.g.*, *Album Review: Girl Talk, All Day*, PITCHFORK (Nov. 29, 2010), http://pitchfork.com/reviews/albums/14899-all-day/ (last visited Mar. 22, 2011) (on file with the Washington and Lee Law Review).

366. *A Few Things To Do While You Wait To Download The Free New Girl Talk Album*, NPR (Nov. 15, 2010), http://www.npr.org/blogs/therecord/2010/11/15/131328464/a-few-things-to-do-while-you-wait-to-download-the-free-new-girl-talk-album (last visited Mar. 22, 2011) (on file with the Washington and Lee Law Review).

367. Michael Gallucci, *Girl Talk Interview*, EXCURSIONS OF A POP RENEGADE (Dec. 21, 2010), http://poprenegade.wordpress.com/2010/12/21/girl-talk-interview/ (last visited Mar. 22, 2011) (on file with the Washington and Lee Law Review).

> I try not to be concerned about the artists' [litigious] reputation when I'm sampling it. I think about that after the fact. On [] *Feed the Animals* there's a bit of Metallica. And on [*All Day*] there's some Prince. A lot of the heavy-hitters have been sampled. I literally put it out and hope for the best. So far, the majority of artists have probably heard of it, or at least their labels have, and I think a lot of people can see the benefits of it. It's not really creating any sort of competition. It's probably turning a chunk of my listeners on to new artists.[368]

Although Gillis has not been sued so far, not all remix artists may be so lucky. And, as he notes, the legal gray areas are vexing because of the necessity of going to court to obtain any certainty. The existing system provides nothing but catch-22s for remix, and this gap in the law is frustrating the original purpose of copyright: Generating the most total profit and thereby incentivizing the maximum amount of creativity.[369] "Listeners deserve to have access to the best and most creative music, and copyright law is supposed to encourage its generation . . . ."[370] Instead, copyright law is frustrating creativity. Remix musicians deserve an opportunity to create, distribute, and profit from their music without legal uncertainty. The law must be changed to eliminate the unfair catch-22s that plague these artists.

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368. *Id.*

369. *See supra* notes 20–21 and accompanying text (discussing the Constitutional purpose of copyright as an incentive to create).

370. Ashtar, *supra* note 62, at 316.